Supreme Court, U.S.
FILED

No. 08-879

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IN THE

Supreme Court of the United States

EXTRA EQUIPAMENTOS E EXPORTAÇÃO LTDA.,

Petitioner,

—v.—

CASE CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DID THE SEVENTH CIRCUIT VIOLATE THE *ERIE* DOCTRINE BY ESTABLISHING A NEW FEDERAL JUDGE-MADE LIMITATION AUTOMATICALLY BARRING COMMON LAW FRAUD CLAIMS WHEREVER A NO-RELIANCE CLAUSE APPEARS IN A COMMERCIAL CONTRACT ENTERED BY PARTIES THAT WERE REPRESENTED BY COUNSEL?

II. DO THE CONFLICTING DECISIONS IN THE SEVENTH CIRCUIT AND OTHER CIRCUITS CONCERNING WHETHER NO-RELIANCE CLAUSES TRIGGER A *PER SE* RULE PRECLUDING FRAUD CLAIMS WARRANT THIS COURT'S CLARIFICATION OF THE BOUNDARY BETWEEN FEDERAL SECURITIES LAW AND COMMON LAW FRAUD CLAIMS?

PARTIES TO THE PROCEEDING

Petitioner in this Court is Extra Equipmentos E. Exportacao Ltda. ("Extra"). Extra is a corporation organized under the laws of Brazil, with its principal place of business in Brazil. Extra was the plaintiff-appellant in the Court of Appeals for the Seventh Circuit, whose judgment is sought to be reviewed.

Case Corporation ("Case") is a corporation organized under Delaware law, with its headquarters in Wisconsin. Case was the defendant-appellee in the court proceedings below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Supreme Court Rules, Plaintiff Extra Equipamentos E Exportacao Ltda. ("Extra") states, by its counsel, the following:

Extra has no parents, subsidiaries or affiliates.

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The Opinion of the United States Court of Appeals for the Seventh Circuit in *Extra Equipamentos E Exportacao Ltda. v. Case Corp.* ("Extra IV") is reported at 541 F.3d 719 (7th Cir. September 3, 2008) and set forth in the Appendix hereto (App. 1a-31a).

The Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois in *Extra Equipamentos E Exportacao Ltda. v. Case Corp.* is reported at 2007 WL 1549493 (N.D. Ill. May 24, 2007) and set forth in the Appendix hereto (App. 36a-48a).

The Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois in *Extra Equipamentos E Exportacao Ltda. v. Case Corp.*, dated March 27, 2007, is not reported and is set forth in the Appendix hereto (App. 49a-56a).

The Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois in *Extra Equipamentos E Exportacao Ltda. v. Case Corp.*, dated November 27, 2006, ("Extra III") is not reported and is set forth in the Appendix hereto (App. 57a-73a).

The Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois in *Extra Equipamentos E Exportacao Ltda. v. Case Corp.* is reported at 2005 WL 1651738 (N.D. Ill. July 01, 2005) and set forth in the Appendix hereto (App. 74a-80a).

The Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois in *Extra Equipamentos E Exporta-*

cao Ltda. v. Case Corp. is reported at 2005 WL 843297 (N.D. Ill. January 20, 2005) and set forth in the Appendix hereto (App. 81a-111a).

The Opinion of the United States Court of Appeals for the Seventh Circuit in *Extra Equipamentos E Exportacao Ltda. v. Case Corp.* ("Extra II") is reported at 361 F.3d 359 (7th Cir. March 15, 2004) and set forth in the Appendix hereto (App. 112a-123a).

The Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois in *Extra Equipamentos E Exportacao Ltda. v. Case Corp.* ("Extra I") is reported at 2002 WL 1888540 (N.D. Ill. Aug. 15, 2002) and set forth in the Appendix hereto (App. 124a-137a).

BASIS FOR JURISDICTION

This action asserting common law fraud claims against Case arising under the laws of the State of Illinois was filed by Extra in 2001 in the District Court for the Northern District of Illinois. Jurisdiction of the District Court over the fraud claims was based on diversity of citizenship.

The United States Court of Appeals for the Seventh Circuit affirmed in part and reversed in part the Final Judgment of the District Court for the Northern District of Illinois on September 3, 2008 (App. 1a-31a). On September 29, 2008, the United States Court of Appeals for the Seventh Circuit denied Extra's petition for rehearing *en banc* and panel rehearing (App. 34a-35a). This petition for a writ of certiorari is filed within 90 days from the date of the denial of the petition for rehearing *en banc* and

panel rehearing. 28 U.S.C.A. § 2101(c); SUP. CT. R. 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1652: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT OF THE CASE[1]

Case Corporation ("Case"), the defendant-appellee, is a major manufacturer of farm and construction equipment, headquartered in Wisconsin. Case was in the midst of merger talks with a competitor, New Holland, when rumors of rampant corruption involving the Vice President, Mario Hirose, and other top executives of its Brazilian subsidiary, Case Brasil & Cia ("Case Brasil") surfaced. The rumors were all too true. Case Brasil's fraud entailed arranging loans guaranteed by Case for poor Brazilian farmers who had no hope of paying them off in order to get the farmers to buy costly Case farm equipment through Case Brasil's distributor network. The inflated sales fueled by the fraudulent loans caused the annual sales bonuses of Case

[1] The facts are drawn from the Memorandum and Order of the United States District Court, Northern District of Illinois, dated November 27, 2006. (App. 57a-73a.)

Brasil's top executives to skyrocket. When the loans went into default, the unpaid amounts of the bad loans were debited against the sales commissions and warranty repair payments owed by Case Brasil to its distributors. These charge backs and credits were recorded in the distributors' open accounts. Case Brasil executives also routinely extorted money and other favors from these same distributors by threatening to terminate their contracts or cut off their credit.

Extra Equipmentos E Exportacao Ltda. ("Extra"), the plaintiff-appellant, was the largest Brazilian distributor of Case farm equipment. Extra had long been a target of extortion orchestrated by Hirose and Extra's viability was jeopardized by the huge illicit charge backs Case Brasil had posted to Extra's open account. Extra, despite Case Brasil's threats of retaliation, sued Case Brazil to recoup its damages and reverse the unlawful debits. Extra also lodged a complaint with CADE, the Brazilian antitrust authority, to block Case's proposed merger and put a spot light on Case Brasil's criminal conduct. Case, by this point, was anxious to clean up its Brazilian legal problems, which threatened to derail the merger. Persio Briante, Extra's President, met with Brian Cahill, a senior Case in-house lawyer, ostensibly to settle Extra's suit and antitrust objections. But Cahill, who had been tasked with investigating the rumors of corruption in Case Brasil's operations, was interested in a broader picture of Case Brasil's wrong doing. Briante confirmed Cahill's worst fears as to the extent of the corruption and advised him that Extra's suit was mainly designed to get Case's attention. Cahill reported on his talks with Briante to James A. Sharman, the Case Vice President responsible for South American operations.

Case still could not move against Hirose and his minions, due to their political influence in Brazil, without proof of their wrongdoing that would stand up in a Brazilian court. Sharman recognized that Extra could be the key to solving Case's problems. Sharman decided to win Extra over by dangling the bait that Case would resolve all of Extra's problems with Case Brazil in exchange for Extra's cooperation in getting the goods on Hirose and his cronies and a release of Extra's claims against Case Brasil.

Sharman set up a meeting with Briante and Extra's counsel at an isolated Case airplane hanger in Waukegan. Case was represented at this meeting, which occurred on October 19th, 1999, by Sharman, Cahill, and outside counsel. No Case Brasil employees attended. Sharman chose the airplane hanger for the meeting to prevent Hirose and his confederates from getting wind of his plans to fire them. Briante, for his part, kept silent as he was afraid of retaliation if Hirose learned he was talking to Case. At the start of the meeting, Sharman identified himself as a Case Senior Vice President. The negotiations, which took most of the day, concluded with the entry of a settlement agreement and release (the "Waukegan Agreement") in which Extra agreed to everything Case wanted. Extra signed a release, dismissed its Brazilian suit, withdrew its objection to the Case/New Holland merger, and provided Case with detailed evidence of the on-going corruption at Case Brasil. Briante also promised to back up this evidence with court testimony. Sharman, in turn, had promised first orally, and then in the Waukegan Agreement itself, to have Case Brasil audit Extra's open account and remove the illicit debits; to cap Extra's liability, if any, to Case Brasil at R$2,000,000; and to make sure Extra was retained by Case Brasil

as a Case distributor in good standing in its existing Brazilian territory. Extra had no reason to distrust Sharman and no way to verify his representations.

But Case never intended to keep these promises. Once Case obtained what Case needed to solve its pressing problems, Case connived with Case Brasil to see to it that the Waukegan Agreement was a nullity. In short order, Case Brasil disregarded the cap on Extra's liability and virtually all the salient terms in the Waukegan Agreement relating to Extra's continuing as a Case distributor in its former territory. Ultimately, Extra was terminated as a Case distributor and suffered losses of millions of dollars.

Extra filed suit against Case in November, 2001. The original complaint asserted a contract claim that was dropped, because joinder of Case Brasil as a defendant on the contract claim would have destroyed diversity. The amended complaint pled counts for fraud and promissory fraud. Case moved to dismiss on the ground that Case Brasil was an indispensable party and for a transfer of the suit to Brazil on *forum non conveniens* grounds. Judge Manning granted Case's motion to dismiss, and Extra appealed.

The United States Court of Appeals for the Seventh Circuit reversed and remanded. Judge Posner wrote the *Extra II* decision, which held that Case Brasil was not an indispensable party, because Extra claims against Case sounded in fraud, not contract. The fraud count was based on misrepresentations made by Case during the negotiations in Waukegan. These included:

> [T]he promise that Case Brasil would not terminate Extra or seek payment of more than $2 million was the bait dangled before

> Extra to persuade it both to drop its suit against Case Brasil and give Case the information about Case Brasil's corrupt employees that Case needed to clean up its subsidiary.

Extra II, 361 F.3d at 363 (7th Cir. 2004).

After the close of discovery, Judge Manning granted Case's summary judgment motion. Although genuine factual disputes existed as to Case's participation in a fraudulent scheme and Sharman's authority to sign the Waukegan Agreement on Case Brasil's behalf, the District Court nonetheless held that the boiler plate no-reliance clause in the Waukegan Agreement barred the fraud claims alleged against Case, because, in the lower court's view, that clause made Extra's crediting of Sharman's deceit unreasonable as a matter of law. The court below also dismissed the count for fraud in the inducement on the alternative ground that Extra did not establish proximate cause for its admitted injuries. Extra moved for reconsideration under Rule 59(e) of the Federal Rules of Civil Procedure. That motion was denied on March 26, 2007.

Extra appealed to the United States Court of Appeals for the Seventh Circuit. The appeal was heard by the same panel—Judges Posner, Rovner, and Ripple—that decided *Extra II*. The grant of summary judgment was affirmed on September 3, 2008. In a split decision, the majority panel, composed of Judge Posner and Judge Rovner, agreed with Judge Manning that the fraud claims against Case were scotched as a matter of law by the no-reliance clause in the Waukegan Agreement, which Judge Posner labeled a "Big Boy" clause. However, the majority took a different route to reach that

result than did the court below. Judge Manning believed that *Rissman* established a bright-line *per se* rule proscribing all fraud claims based on extra-contractual discussions if a no-reliance clause had been entered. Judge Posner, however, devised a new federal "quick look" test to determine when a no-reliance clause triggered a *per se* rule barring fraud claims. The "quick look" test adopted in *Extra IV* involved a limited look outside the four corners of the contract to see whether Extra had been represented by counsel during the contract negotiations. Since Extra was represented, the majority in *Extra IV* disregarded the evidence of Case's fraud pointed out by Judge Manning.

Extra moved for rehearing *en banc* and panel rehearing which was denied on September 29, 2008. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

I. THE *EXTRA IV* DECISION ERRONEOUSLY CREATES A NEW FEDERAL RESTRICTION ON COMMON LAW FRAUD CLAIMS IN CONTRAVENTION OF THE *ERIE* DOCTRINE

A. The *Extra IV* Decision Eviscerates The Fraud Exception To The Parol Evidence Rule By Limiting that Exception to Consumer Contracts

The majority decision in *Extra IV* cannot be reconciled with the prior case law in Illinois and in the Seventh Circuit applying Illinois law to contractual defenses to fraud. The Illinois test as to whether reliance on oral false promises was reasonable or justifiable requires an in-depth inquiry into the con-

text in which the allegedly false statements had been made. *See* 19A Illinois Law & Prac., Fraud § 7 (2008). The parol evidence rule, as a contract doctrine, presented no barrier to relying on what was said in contract negotiations to prove fraud which sounds in tort. Judge Posner, writing for the majority in *Extra IV*, devised a new, bright line test for deciding when a no-reliance clause acts as a complete defense to common law fraud claims: wherever a no-reliance clause appeared in a commercial contract, the sole inquiry of the trial court was to be whether the party claiming fraud had counsel when the contract was negotiated. If so, this triggered a *per se* rule barring any claim for fraud as a matter of law. The scope of this *per se* rule is narrower than the one a broad reading of *Rissman* would lead to as it applies to "Big Boys" represented by counsel. But the *Extra IV* holding nonetheless guts the long settled fraud exception to the parol evidence rule by limiting the fraud exception to consumer contracts.

The record facts before the *Extra IV* Court were that during the single day negotiation session conducted at an isolated Waukegan airplane hangar James Sharman, a Case Senior Vice President, falsely told Extra's President, Persio Briante, that any liability that Extra might have to Case Brasil as a result of a dispute over the debitting of bad loans against Extra's sales commissions and reimbursements for warranty repairs would be capped at R$2,000,000, Extra would be kept on as distributor in its existing territory under the same terms as other Case distributors, and that Sharman had the authority to bind Case Brasil to these promises. The Waukegan Agreement, which embodied Sharman's key false oral representations, contained a standard no reliance clause.

The rationale for using a no reliance clause was explained by the Seventh Circuit in *Rissman v. Rissman*, 213 F.3d 381, 384 (7th Cir. 2000), the precursor to *Extra IV*. In *Rissman*, a federal securities law fraud case, the Court reasoned that a party that has gotten written notice of the truth cannot reasonably rely on contrary oral promises. *Rissman* concerned the sale of a family toy business: the sales contract contained a clause accelerating the scheduled payments to the seller for his stock in the event control of the company changed hands. This acceleration clause (which dealt with the consequences of a change of control) belied the seller's claim that he was defrauded by the buyer's false promise that the company would not be sold. The inherent contradiction between the written acceleration clause and the alleged false promise not to sell the business made any reliance by the seller on the truth of the alleged promise unreasonable.

Extra's common law fraud claims against Case were similarly dismissed on the ground that the no reliance clause renders any reliance on Sharman's false statements unreasonable as a matter of law. The no-reliance clause in the Waukegan Agreement, like the one in *Rissman*, only applied to oral misrepresentations that were not subsequently repeated in the contract. And as Judge Ripple pointed out in a blistering dissent, "Extra's promissory fraud claim is predicated upon the representations and warranties expressed in the release itself, [so] the no reliance clause, by its plain language, cannot prevent Extra from establishing reliance as a matter of law on that claim." *Extra IV*, 541 F.3d at 733.

The majority opinion in *Extra IV* offered no rejoinder to Judge Ripple's assertion that the no-reliance clause in the Waukegan Agreement, by its

terms, did not cover the false representations repeated in that agreement. However, the majority panel may have overlooked these inconvenient record facts, because *Extra* was otherwise an ideal case to make new law precisely because the conduct of Case had to be assumed to be blame worthy in the context of a summary judgment motion since Judge Manning had found a triable issue of fact as to Case's involvement in a fraudulent scheme.

In an article revised on September 18th, Judge Posner used his opinion in *Extra IV* to illustrate his thesis "that [the] concepts of fault or blame are not useful addenda to the doctrines of contract law". Richard A. Posner, *Let Us Never Blame A Contract Breaker*, 107 Mich. L. Rev. (forthcoming), at 1 (available at https://www.law.uchicago.edu/files/contract-rposner.pdf, visited December 22, 2008). Judge Posner describes the *Extra* case as an interesting example of wrongful conduct in the negotiation or performance of a contract. *Id.* at 11. The result of his *Extra IV* decision, Judge Posner admits, was that despite the fact Case was assumed to have acted wrongfully, Extra was left with no remedy either in contract or in tort. *Id.* at 12. This is not, however, a "bad result" in Judge Posner's eyes, "[p]rovided, as was true in my case, that [Briante, Extra's President] was well represented in the contract negotiations, [as] he gave away his right to sue for fraud, with his eyes open, and presumably was compensated in other terms of the contract for making this concession". *Id.* Extra's right to sue Case for fraud had in Judge Posner's analysis been scotched by a no reliance clause in a contract that Case had not entered as a party.

While it might be highly desirable to implement a no-fault theory of contract where the presence of a

simple no-reliance clause in a commercial contract would automatically preclude all fraud suits without the need for discovery or a trial, it is for the Illinois legislature, not a federal court, to decide whether to adopt such a door-closing rule on common law fraud claims. Illinois law gives Extra a remedy sounding in fraud for what Judge Posner was obliged to assume was wrongful conduct by Case in the negotiation and performance of the Waukegan Agreement. In *Erie R. Co. v. Tomkins*, 304 U.S. 64, 78 (1938), this Court held that: "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law."

There can be no question that in the present action, Illinois law—not general federal law—should have governed the Seventh Circuit's analysis of Extra's common law fraud claims. *See* 36 C.J.S. Federal Courts § 225 (2008) (citing *City Messenger of Hollywood, Inc. v. City Bonded Messenger Service, Inc.*, 254 F.2d 531 (7th Cir. 1958)). This Court has granted certiorari in the past where the lower courts ignored the governing state law. *See Bernhardt v. Polygraphic Company of America, Inc.*, 350 U.S. 198, 200 (1956) ("The case is here on a petition for certiorari which we granted, because of the doubtful application by the Court of Appeals of *Erie R. Co. v. Tompkins.*"); *see also O'Melveny & Myers v. Federal Deposit Insurance Corp.*, 512 U.S. 79, 83-84 (1994).

B. The Restriction On Common Law Fraud Adopted In *Extra IV* Ignores the Governing Illinois Law

There also can be no question that the majority panel in its opinion chose to ignore several different aspects of the governing Illinois law. For one, the majority panel allowed Case—a non-party to Waukegan Agreement—to enforce a provision in that contract to avoid a fraud claim, contrary to the strong presumption in Illinois that only the parties to a contract may enforce its terms. *See Caswell v. Zoya Int'l, Inc.*, 274 Ill. App. 3d 1072, 1074, 654 N.E.2d 552, 554 (Ill. App. Ct. 1995); *F.W. Hempel & Co. v. Metal World, Inc.*, 721 F.2d 610, 614 (7th Cir. 1983). Indeed, the panel did not address or distinguish Illinois authority on this point.

Moreover, in the *Extra II* decision, Judge Posner declared that the essence of Extra's fraud claim (which stood alone, separate from a contract theory) was that Case schemed with Case Brasil "to make sure that Extra would not benefit from the [Waukegan Agreement]." *Extra II*, 361 F.3d at 360. Yet when the matter came up on appeal a second time, Judge Posner, writing for the majority, upheld the dismissal of Extra's fraud claims on the ground that, *inter alia*, Extra failed to assert that Case Brasil was not bound to the Waukegan Agreement. *Extra IV*, 541 F.3d at 725-26. The reasoning of the majority apparently was that Extra could not pursue its fraud claim and avoid the no-reliance clause without seeking rescission of the Waukegan Agreement in its entirety. The dissent explained that rescission of its contract with Case Brasil was not an option for Extra, which had fully performed its part of the bargain before learning that Case had no

intention of making good on its promises. *Id.* at 734. But, more importantly, there is no support for the proposition that Extra had to disavow the Waukegan Agreement to pursue its fraud claim against Case in the governing law of Illinois. Certainly, the majority cited no Illinois authority that so held.

Finally, and most importantly, contrary to the *per se* rule adopted by the majority, the common law fraud test in Illinois requires a detailed examination by the fact-finder of whether under all the circumstances, plaintiff, given his particular characteristics, had the right to rely on the false statements. *See Douglass v. Wones*, 120 Ill. App. 3d 36, 47-48, 458 N.E.2d 514, 523-24 (Ill. App. Ct. 1983); *Schmidt v. Landfield*, 20 Ill. 2d 89, 93-94, 169 N.E.2d 229, 231 (Ill. 1960). And, Illinois follows the majority rule that reliance on prior oral misstatements is justifiable unless the fraud victim is reckless. *See Roda v. Berko*, 401 Ill. 335, 342, 81 N.E.2d 912, 916 (Ill. 1948) (party guilty of deliberate fraud "cannot defend against such fraud by saying the same might have been discovered had the party whom he deceived exercised reasonable diligence and care"); *Eisenberg v. Goldstein*, 29 Ill. 2d 617, 621, 195 N.E.2d 184, 186 (Ill. 1963) (cry of negligence will not defeat deliberate fraud); *see also* 27 *Williston on Contracts* § 69:34 at 25 (4th ed. 2003) ("The growing trend and tendency of the courts will continue to move to the doctrine that negligence will not excuse positive willful fraud.").

Illinois' law with respect to promissory fraud differs from most other jurisdictions. The lower court in *Extra III* found evidence of a fraudulent scheme to defraud Extra by manipulating the legal distinctions between Case and its wholly owned Case

Brasil subsidiary. On this crucial point, Judge Manning had found:

> For instance, according to Extra's owner, Persio Briante, as soon as Case got that information it wanted from Extra, it reneged on its various agreements. Specifically, Case failed to stop Case Brasil from terminating the distributorship agreement with Extra. Briante also contends that Case allowed Case Brasil to pressure Extra into forfeiting either the $2 million cap on Case Brasil's liability or risk Case Brasil terminating the distributorship (which it eventually did). Evidence of a series of broken promises, even if the promises are all related, is sufficient to prove a scheme to defraud.

Extra III (App. 70a-71a).

All the elements of promissory fraud under Illinois law as delineated in *Extra II* presented triable issues of fact on the record made for the summary judgment motion except for the issue of reliance, which Judge Manning mistakenly felt was covered by *Rissman*. It is clear from the *Extra IV* holding that *Rissman* did not mandate automatic preclusion of Extra's fraud claims, without looking beyond the Waukegan Agreement. But the majority ignored the Illinois law requiring a far-reaching examination, not just into the question of representation, but also into the circumstances of the fraud. On the record this sort of examination would have required a plenary trial. Instead, the *Extra IV* decision, in effect, holds that as a matter of law the factual issue as to the justifiability of Extra's reliance had to be resolved against Extra, simply because it had counsel. Once

again, the majority in *Extra IV* ignored the Illinois standard on fraud by applying a judge-made blanket *per se* rule. The difficulty with a one-rule-fits-all approach to fraud is that it lets fraud be perpetrated in some instances in exchange for contract certainty. The majority of the federal circuit judges in *Extra IV* were in favor of this policy choice. The legislature of Illinois has given no indication it would embrace this change in the law. This creation of the Seventh Circuit finds no support in Illinois law and is therefore incompatible with this Court's instruction in *Erie* and its progeny.

The patent violation of the *Erie* Doctrine in *Extra IV*, however high-minded the motivation of the majority, warrants this Court granting *certiorari*, and redressing the constitutional wrong.

II. THIS COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE CIRCUITS IN THE TREATMENT OF CONTRACTUAL DEFENSES TO FRAUD CLAIMS BY REESTABLISHING THE BOUNDARY BETWEEN FEDERAL SECURITIES FRAUD CLAIMS AND STATE COMMON LAW FRAUD CLAIMS

A dispute has arisen, since *Rissman* was handed down, as to whether its holding established a *per se* rule, in federal 10b-5 fraud suits that a no-reliance clause precluded as a matter of law any claim of precontractual deceit. The seeds of the dispute trace back to the concurrence written by Judge Rovner, which emphasized the *Rissman* holding was based on all the facts and circumstances of the case and should not be construed as an automatic *per se* rule triggered by a no-reliance clause. The import of *Rissman* was addressed in *Vigortone AG Products*,

Inc. v. PM AG Products, Inc., 316 F.3d 641 (7th Cir. 2002), which involved a dispute that arose out of the sale of a pig farm. The sales contract in *Vigortone* had an integration clause, which the Court decided, based on Illinois law in this diversity case, was no bar to fraud. But the *Vigortone* panel parenthetically, *in dicta* citing *Rissman*, observed that where sophisticated commercial enterprises had negotiated a sales contract with a no-reliance clause, a fraud suit may be precluded. *Id.* at 644-45. This suggests the "Big Boy" factor might be dispositive of reliance in federal securities fraud actions. Still, the holding in *Vigortone* was consistent with the long standing Illinois law precept that "a potential victim of a fraud may not ignore a manifest danger [of deception]." *Id.* at 645 (*citing AMPAT/Midwest, Inc. v. Illinois Tool Works Inc.*, 896 F.2d 1035, 1042 (7th Cir. 1990) (the victim of a deliberate fraud is barred only if he has notice of the fraud, and so he need only avoid deliberate or reckless risk).

In any event, the proposition that a no-reliance clause precludes fraud as a matter of law was rejected in the decisions from other circuits discussed in *Extra IV*. The First Circuit in *Jackvony v. RIHT Financial Corp.*, 873 F.2d 411 (1st Cir. 1989), held that a no-reliance clause should be treated as but one factor in considering whether reliance was unreasonable but the presence of a no-reliance clause was not itself an automatic bar to a fraud claim. In *One-O-One Enterprises, Inc. v. Caruso*, 848 F.2d 1283 (D.C. Cir. 1988), the District of Columbia Circuit Court of Appeals decided an integration clause made reliance on the fraud alleged in that case unreasonable. But in a subsequent decision, *Whelan v. Abell*, 48 F.3d 1247, 1258 (D.C. Cir. 1995), the D.C. Circuit, in a 10b-5 case, restricted the

One-O-One holding to its peculiar facts, explaining that *One-O-One* was not intended to establish a rule that integration clauses generally bar fraud claims, for "[s]uch a reading would leave swindlers free to extinguish their victims' remedies simply by sticking in a bit of boiler plate." Finally, the Sixth Circuit in *Brown v. Earthboard Sports, USA, Inc.*, 481 F.3d 901 (6th Cir. 2007), a Rule 10b-5 case, addressed whether a no-reliance clause could bar fraud claims against a defendant that was not a party to the contract at issue. Summary judgment had been entered against Brown, as he had signed a subscription agreement containing a no-reliance clause. In reversing, the Sixth Circuit found it "noteworthy that the appellees were not themselves parties to the subscription agreement containing the non-reliance clause," *Brown*, 481 F.3d at 921, and then went on to treat the non-reliance clause as just one evidentiary factor to be evaluated in the total context of the alleged fraud. The upshot of these decisions is that the First, Sixth, and District of Columbia Court of Appeals have refused to condone fraud in exchange for contractual certainty.

Moreover, the appellate courts in other circuits have refused to enforce contractual disclaimers of reliance where the complainant can show that the fraud claims are based on facts peculiarly within the knowledge of the party accused of fraud. *See e.g.*, *Banque Arabe et Internationale D'Investissement v. Maryland Nat'l Bank*, 57 F.3d 146, 155 (2d Cir. 1995). In the broad inquiry required by Illinois law this would likely be a dispositive factor favoring Extra, because there can be no recklessness with respect to a risk which the plaintiff cannot learn about. On the record in this case, the truth or falsity of what Sharman promised was a matter peculiarly

within the knowledge of Case. There was no chance that Briante or Extra's attorneys who were isolated in Case's airplane hanger for the entirety of the day-long negotiations could verify or look behind Sharman's duplicitous promises. Executives from Case Brasil had, of necessity, been deliberately excluded from the meeting by Case, and Briante was afraid of Hirose and had no opportunity to check with Case Brasil's management during the course of the brief negotiations even if he wanted to do so. The essence of the fraud, as the Court noted in *Extra IV*, was getting Extra to sign the Waukegan Agreement, when Case knew that Case Brasil would not perform its obligations. Indeed, since Case would only appoint new managers at Case Brasil after the Waukegan Agreement was signed Extra had no way of knowing whether the new team at Case Brasil would adhere to that contract. In these unusual circumstances, Extra had no choice but to rely on the honesty of Case, whom Extra had no reason to distrust. *See AES Corp. v. Dow Chem. Co.*, 325 F.3d 174, 182 (3rd Cir. 2003) (holding that even a sophisticated investor is not barred from reliance upon the honesty of those with whom he deals in the absence of knowledge that the trust is misplaced).

These cases show there is considerable uncertainty at present as to how to evaluate contractual defenses to fraud claims. The conflict in the cases is even more pronounced where federal courts, like the *Extra IV* majority panel, have blurred the line between federal securities law fraud claims and common law fraud claims. Often federal policies enunciated in Rule 10b-5 fraud cases are applied, without considering the different policies that informed the development of the common law of fraud. This Court by granting certiorari in this case,

could clarify this vital area of law by reestablishing the boundary between federal and state fraud claims.

CONCLUSION

For all the reasons set forth herein, the petition for a writ of certiorari should be granted, the decision of the United States Court of Appeals for the Seventh Circuit should be reversed, and the matter remanded to the United States District Court of the Northern District of Illinois for a trial on the merits of Extra's claims.

Dated: New York, New York
December 29, 2008

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

Nos. 06-4389, 07-1794, 07-2484

EXTRA EQUIPAMENTOS E EXPORTAÇÃO LTDA.,
Plaintiff-Appellant,

—v.—

CASE CORPORATION,
Defendant-Appellee.

Argued April 1, 2008
Decided September 3, 2008
Rehearing and Rehearing En Banc Denied
September 29, 2008.*

PAUL F. DOYLE (argued), WILLIAM R. GOLDEN, JR., KELLEY, DRYE & WARREN, New York, NY, for Plaintiff-Appellant.

* Circuit Judge Joel M. Flaum did not participate in the consideration of this petition for rehearing.

CHRISTOPHER LANDAU (argued), KIRKLAND & ELLIS, WASHINGTON, DC, BRIAN D. SIEVE, KIRKLAND & ELLIS, Chicago, IL, for Defendant-Appellee.

Before POSNER, RIPPLE, and ROVNER, Circuit Judges.

POSNER, Circuit Judge.

Extra, a Brazilian distributor, sued Case, a large U.S. manufacturer of farm and construction equipment, in the federal district court in Chicago, charging fraud. Jurisdiction was based on 28 U.S.C. § 1332(a)(2), because the suit was between a citizen of a state (Case) and citizens of a foreign country (Extra and its boss—the latter no longer a party). The law governing the substantive issues in the case is agreed to be that of Illinois. The district judge dismissed the suit on the ground that Case Brasil & Cia—Case's wholly owned Brazilian subsidiary—was an indispensable party to the suit. Fed.R.Civ.P. 19(b). Extra appealed and we reversed, 361 F.3d 359 (7th Cir.2004), and the case went back to the district court for discovery. Eventually Case moved for summary judgment, which was granted, and Extra appeals. It also appeals from the district court's order awarding costs to Case as the prevailing party.

In 1992 Case Brasil had hired Extra to distribute Case products in Brazil. In 1999 Extra sued Case Brasil in a Brazilian court, claiming that corrupt employees of the subsidiary had caused it to over-

charge Extra. Later that year, a "Release of Claims and Settlement of Certain Obligations" (we'll call it the "release") was negotiated and signed in Illinois by Persio Briante, Extra's president, on behalf of Extra, and by James Sharman on behalf of Case Brasil. Sharman was a vice president of Case Corporation, not of Case Brasil; no one employed by the latter was present at the negotiation or signed the release.

The release ended the Brazilian litigation and provided among other things (most not pertinent to this case) that Case Brasil would seek no more than $2 million in past-due payments that it claimed Extra owed it under the 1992 distributorship contract. In exchange, Extra, besides agreeing to drop its suit against Case Brasil and also drop an objection it had lodged with Brazilian authorities to a merger that Case wanted to make, agreed to give Case information about the corrupt conduct of Case Brasil's employees that would enable Case to have them removed (thus avoiding possible trouble with the Brazilian government) without the parent or the subsidiary incurring liability to the terminated employees.

The present suit, which Extra filed in 2001, charges that at the negotiation of the release Case's representative, Sharman, had promised that if Extra agreed to the release, Case Brasil would retain Extra as a Case Brasil distributor in good standing; that the promise was fraudulent because Case had no intention of fulfilling it; and that after the release was signed, Case Brasil, claiming not to be bound by the release because it hadn't authorized its parent to make it—indeed, contending that it had had no wind of the negotiations or of the signing of the release—

terminated Extra's distributorship and refuses to recognize the $2 million limit in the release on its money claims. Thus, Extra charges, Case had "manipulated the corporate distinction between itself and Case Brasil" by falsely representing that the Case official who signed the release was authorized to sign on behalf of Case Brasil. Extra contends that as a result of the manipulation, Case obtained the benefits of the release without honoring either the obligations that the release placed on it or Sharman's oral promise to retain Extra as a Case Brasil distributor. Instead Case Brasil quickly terminated Extra as a distributor, precipitating a second Brazilian suit by Extra, in which Extra claimed that the termination violated the 1992 contract. The Brazilian courts agreed that there had been a breach of contract; but specific performance was refused and the Brazilian litigation is now in the damages-determination phase.

The district court's principal ground for dismissing the present suit is a provision in the release captioned "No Reliance On The Other Party." It states that "Both parties represent and warrant that in making this Release they are relying on their own judgment, belief and knowledge and the counsel of their attorneys of choice. The parties are not relying on representations or statements made by the other party or any person representing them except for the representations and warranties expressed in this Release." A claim of fraud requires proof that the victim of the fraud relied on the representations that he contends are fraudulent. E.g., *HPI Health Care Services, Inc. v. Mt. Vernon Hospital, Inc.*, 131 Ill.2d 145, 137 Ill.Dec. 19, 545 N.E.2d 672, 681 (Ill.1989); *Vigortone AG Products, Inc. v. PM AG*

Products, Inc., 316 F.3d 641, 644-45 (7th Cir.2002) (Illinois law). Otherwise he cannot have been hurt by the fraud. If reliance on the allegedly fraudulent statements that Sharman made to Briante in the negotiation of the release is negated by the no-reliance clause, Extra's fraud claim evaporates, as the district court ruled.

Drafters of contracts worry lest in the event of a dispute one of the parties ask the court to depart from the terms of the written contract on the ground that it is not the parties' entire agreement—there are additional terms to which they had agreed during the negotiations leading up to the making of the contract. If such a claim enabled the party making it to obtain a jury trial on the meaning of the contract, the contractual process would be riven by uncertainty. The law's response to this problem is the parol evidence rule, which, so far as bears on this case, forbids the introduction of evidence (whether oral or written) of what was said in the process of negotiating a contract to vary the terms of the contract that resulted from the negotiation, provided the contract seems clear and complete. *A.W. Wendell & Sons, Inc. v. Qazi*, 254 Ill.App.3d 97, 193 Ill.Dec. 247, 626 N.E.2d 280, 287 (Ill.App.1993); *Maas v. Board of Trustees of Community College District No. 529*, 94 Ill.App.3d 562, 50 Ill.Dec. 35, 418 N.E.2d 1029, 1042-44 (Ill.App.1981); *Utica Mutual Ins. Co. v. Vigo Coal Co.*, 393 F.3d 707, 713-14 (7th Cir.2004). The rule implements the parties' intention to "simplify the administration of the resulting contract and to facilitate the resolution of possible disputes by excluding from the scope of their agreement those matters that were raised and dropped or even agreed upon and superseded during the negotia-

tions." 2 E. Allan Farnsworth, *Farnsworth on Contracts*, § 7.2, p. 224 (3d ed.2004).

To make assurance doubly sure, parties to a written contract commonly include in it an "integration" clause; for if they do not, the party resisting the invocation of the parol evidence rule can ask the judge to consider extrinsic evidence bearing on the question whether the parties really did intend the written contract to be the complete and final articulation of their agreement. *Utica Mutual Ins. Co. v. Vigo Coal Co.*, *supra*, 393 F.3d at 714. The parties did include an integration clause in the release. It states: "This Release constitutes the entire agreement between the parties, and this Release supersedes all prior negotiations and agreements between the parties relating to the subject of this Release." So evidence of what was said in the negotiations that led up to the signing of the release would not be admissible—in a suit for breach of contract.

That is a critical qualification. The parol evidence rule is a rule of contract law, and a contract integration clause is a privately negotiated supplement to the rule, and most courts, including, we have assumed (though the matter is not free from doubt), Illinois, hold that neither the rule nor the clause prevents a disappointed party to the contract from basing a tort suit on proof that in the course of the negotiations the other party made fraudulent representations. *Vigortone AG Products, Inc. v. PM AG Products, Inc.*, *supra*, 316 F.3d at 643-44; *General Casualty Co. v. Carroll Tiling Service, Inc.*, 342 Ill.App.3d 883, 277 Ill.Dec. 616, 796 N.E.2d 702, 708-09 (Ill.App.2003); *Pinken v. Frank*, 704 F.2d 1019, 1022-23 (8th Cir.1983); 2 Farnsworth, *supra*, § 7.4, pp. 245, 247.

Granted, a suit for fraud is not a perfect substitute for a suit for breach of contract. There are additional pleading requirements, *see*, e.g., Fed.R.Civ.P. 9(b), and in Illinois fraud must be proved by clear and convincing evidence, and not just by a preponderance of the evidence, *Hofmann v. Hofmann*, 94 Ill.2d 205, 68 Ill.Dec. 593, 446 N.E.2d 499, 506 (Ill.1983); *Williams v. Chicago Osteopathic Health Systems*, 274 Ill.App.3d 1039, 211 Ill.Dec. 151, 654 N.E.2d 613, 619 (Ill.App.1995); *Association Benefit Services, Inc. v. Caremark Rx, Inc.*, 493 F.3d 841, 852-53 (7th Cir.2007) (Illinois law), which is all that is required to prove a breach of contract. Also, the statute of limitations is shorter in a tort suit than in a suit for breach of a written contract—five years rather than ten. 735 ILCS 5/13-205, -206; *LeBlang Motors, Ltd. v. Subaru of America, Inc.*, 148 F.3d 680, 690-91 (7th Cir.1998) (Illinois law). On the other hand, punitive damages can be awarded in a suit for an intentional tort, such as fraud, but not (with rare exceptions, *Morrow v. L.A. Goldschmidt Associates, Inc.*, 112 Ill.2d 87, 96 Ill.Dec. 939, 492 N.E.2d 181, 183-86 (Ill.1986); *Zapata Hermanos Sucesores, S.A. v. Hearthside Baking Co.*, 313 F.3d 385, 389-91 (7th Cir.2002) (Illinois law)) in a suit for breach of contract.

The tradeoffs are complex. But as this case, in which the claim of fraud is based on statements made in a negotiation that resulted in a contract, illustrates, a suit for fraud can be a device for trying to get around the limitations that the parol evidence rule and contract integration clauses place on efforts to vary a written contract on the basis of oral statements made in the negotiation phase. The release nowhere promises to retain Extra as a dis-

tributor of Case products; the fraud suit is based on an alleged oral promise to that effect—made en route to the signing of a contract (the release) that did not contain any such promise.

No-reliance clauses serve a legitimate purpose in closing a loophole in contract law (thus resisting, in Judge Kozinski's colorful expression, the metastasizing of contract law into tort law, *Oki America, Inc. v. Microtech Int'l, Inc.*, 872 F.2d 312, 315 (9th Cir.1989)). They are, we have held, enforceable in Illinois, *Vigortone AG Products, Inc. v. PM AG Products, Inc.*, *supra*, 316 F.3d at 644-45, as elsewhere. *Sundown, Inc. v. Pearson Real Estate Co.*, 8 P.3d 324, 331-32 (Wyo.2000); *Haygood v. Burl Pounders Realty, Inc.*, 571 So.2d 1086, 1088-89 (Ala.1990); *Rissman v. Rissman*, 213 F.3d 381, 383-85 (7th Cir.2000); *Manufacturers Hanover Trust Co. v. Yanakas*, 7 F.3d 310, 315-18 (2d Cir.1993); *First Financial Federal Savings & Loan Ass'n v. E.F. Hutton Mortgage Corp.*, 834 F.2d 685, 687-88 (8th Cir.1987); *Landale Enterprises, Inc. v. Berry*, 676 F.2d 506, 507-08 (11th Cir.1982) (per curiam). But that is in general rather than in every case. The purpose of such a clause is to head off a suit for fraud, but the clause doesn't say that; it uses the anodyne term "reliance" and a lay person might not realize how much he was giving up by agreeing to the inclusion of the clause in his contract.

In the trade, no-reliance clauses are called "big boy" clauses (as in "we're big boys and can look after ourselves"). But if someone who is *not* a big boy—indeed is not even represented by counsel—signs a big-boy clause, there can be a problem, and this has led some courts to require, before such a clause can be enforced, an inquiry into the circum-

stances of its negotiation, to make sure that the signatory knew what he was doing. *See Brown v. Earthboard Sports USA, Inc.*, 481 F.3d 901, 920-21 (6th Cir.2007); *AES Corp. v. Dow Chemical Co.*, 325 F.3d 174, 180-81 (3d Cir.2003); *see also Rissman v. Rissman*, *supra*, 213 F.3d at 387-89 (concurring opinion). (The D.C. Circuit appears to be on both sides of the question. Compare *One-O-One Enterprises, Inc. v. Caruso*, 848 F.2d 1283, 1286-87 (D.C.Cir.1988), with *Whelan v. Abell*, 48 F.3d 1247, 1258 (D.C.Cir.1995).)

Whether Illinois would permit or require such an inquiry we do not know, but will assume an affirmative answer. It would not follow that the enforceability of such a clause could never be decided, as Extra seems to believe, without a trial. When no reasonable jury could find that the signatory did not understand the meaning of the no-reliance clause that he signed, the issue of enforceability can be resolved on summary judgment. *FMC Technologies, Inc. v. Edwards*, 2007 WL 1725098, at *2-6 (W.D.Wash. June 12, 2007); *see Cozzi Iron & Metal, Inc. v. U.S. Office Equipment, Inc.*, 250 F.3d 570, 574 (7th Cir.2001) (Illinois law); *MBIA Ins. Corp. v. Royal Indemnity Co.*, 426 F.3d 204, 214-19 (3d Cir.2005). And that is the case here. Briante is the president of a very large company, and he was represented at the negotiation of the release by Brazilian and New York lawyers, all experienced in commercial transactions. Extra is a big boy and acted through counsel. It does not argue that its lawyers were unfamiliar with no-reliance clauses or failed to explain all the terms of the release to Briante, or that Case's representatives misrepresented

the meaning of the no-reliance clause—that is not among the frauds alleged.

It argues instead that the representations that underlie its fraud claim were not "made by the other party"—that is, by Case Brasil— "or any person representing" it, as required by the no-reliance clause. Case Brasil was the other party, and Sharman, who signed for Case Brasil, is not employed by that company, but by Case Corporation. But we do not understand the relevance of who employed Sharman. Extra admits that Sharman represented at the negotiation that he was authorized to sign for Case Brasil, and it does not argue that this was a false representation. And Case admits that Sharman had at least apparent authority to bind Case Brasil. That must be right. He was the *only* signatory on Case Brasil's behalf, signing directly below the legend CASE BRASIL & CIA in the signing space of the release. If he had neither actual nor apparent authority to bind Case Brasil, the contract was not agreed to by one of its two parties and is therefore unenforceable. But Extra does not argue that it is unenforceable. It would like to have the benefit of that $2 million ceiling on money owed Case Brasil. If Extra sued to enforce the release, and Case Brasil defended on the ground that Sharman had lacked the authority to make a contract on Case Brasil's behalf, Extra would be indignant and the defense would be laughed out of court.

Extra is driven to argue that while Sharman was authorized to sign the release on behalf of Case Brasil, the representations that Extra is complaining about are representations that he made on behalf of Case rather than Case Brasil and therefore he was not speaking as a representative of the latter. This

bit of wordplay does violence to the language of the no-reliance clause, which refers to representations by a party's representative—and Sharman was representing Case Brasil, a party (the only party, besides Extra). It is also unrealistic. Extra itself argues that in promising to retain Extra as a distributor, Sharman was trying to get Extra to sign the release so that *Case Brasil* could obtain at no cost evidence of corruption that would enable it to fire its misbehaving employees and thus avoid getting into trouble with the Brazilian government without incurring liability to them. If Sharman was lying, as Extra contends, he was lying on behalf of both his employer and the employer's wholly owned subsidiary—in which he had a special interest because he was in charge of Case's Latin American subsidiaries, which included Case Brasil.

So the no-release clause is valid and applicable. And if it weren't, that would not save the day for Extra. For its suit is a suit for fraud, and the significance of the no-reliance clause, which does not depend on its enforceability in contract law, is that its language and the circumstances of its negotiation render Extra's reliance on Sharman's supposed oral misrepresentations unreasonable as a matter of law. The principle behind a no-reliance clause is, as this court explained in *Rissman v. Rissman*, *supra*, 213 F.3d at 384,"functionally the same as a doctrine long accepted in this circuit: that a person who has received written disclosure of the truth may not claim to rely on contrary oral falsehoods." Thus, whether a person reasonably appears to have authority to sign a contract on behalf of a party is a different question from whether a reasonable person would rely on such a person's representations. Had

Sharman disclaimed authority to act on behalf of Case Brasil, how could Extra reasonably have relied on his oral representations about what Case Brasil would do? If Santa Claus had showed up at the bargaining table in place of Sharman, his absence of apparent authority to bind Case Brasil would not render Extra's reliance on his oral promises reasonable.

Notice too that the no-reliance clause refers to the "party's representative"—a term broader than apparent authority. A person may "represent" another without giving the impression that he has the authority to bind the person he represents—lawyers represent companies in mergers without having apparent authority to consummate the transaction.

Case's written disclosure in the no-reliance clause, in short, made Extra's reliance on oral representations unreasonable no matter what Case's (or Sharman's) authority, actual or apparent, was vis-à-vis Case Brasil. If Case had authority, actual or apparent, then Extra was bound by the no-reliance clause; if Case didn't even have apparent authority, Extra was unreasonable in relying on its oral representations.

There is more that is wrong with Extra's suit. Extra's theory is that Sharman made oral misrepresentations in the negotiation in order to induce Extra to agree to the release. That sounds like a fraud designed to induce the victim to sign a contract; and the remedy for fraud in the inducement is to rescind the contract. *Tower Investors, LLC v. 111 East Chestnut Consultants, Inc.*, 371 Ill.App.3d 1019, 309 Ill.Dec. 686, 864 N.E.2d 927, 939 (Ill.App.2007); *Kochert v. Adagen Medical Int'l, Inc.*, 491 F.3d 674, 678-79 (7th Cir.2007). But Extra is

emphatic that it is not charging fraud in the inducement and has no desire to rescind the release. The fraud it charges is an oral promise—to retain it as a distributor for Case Brasil—that Case did not intend to honor. But what damages could it have incurred as a result of the fraud? It is not contending that it would be better off had it not been induced to sign the release. It complains about being terminated as a distributor. But that is the subject of its Brazilian suit for breach of the distributorship contract. It does not argue that the termination was more costly to it because of Sharman's promise not to terminate it.

So the suit was properly dismissed, and we move to the issue of costs. The district court awarded Case, as the winning party, some $116,000 in court costs. Rule 54(d) of the civil rules provided (when the costs were awarded in this case—the rule now reads "costs—other than attorney's fees—should be allowed to the prevailing party," but the committee note explains that the change is only "stylistic") that the costs specified in 28 U.S.C. § 1920 "shall be allowed as of course to the prevailing party unless the court otherwise directs." Extra argues that the district court should have "otherwise direct[ed]," awarding no costs, to punish Case for not presenting its defense based on the no-reliance clause until almost five years after Extra filed this suit. The argument is frivolous. The process for awarding court costs is intended to be summary. Extra wants to turn it into an inquest on the winning party's litigation strategy. Should Case have filed a motion to dismiss based on the no-reliance clause? Should it have filed its motion for summary judgment earlier? Did it need discovery in order to establish the

enforceability and applicability of the no-release clause? Was it a foot-dragging defendant? These are not issues that a district court should have to resolve in order to decide whether a tiny fraction of the expenses of a protracted litigation, now almost seven years old, should be shifted from the losing to the winning party.

Extra also complains about two of the cost items—court reporter attendance fees of some $8,700 and translation fees of almost $76,000—that the judge awarded. The first complaint has no merit. The statute authorizes the award as costs of "fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case." 28 U.S.C. § 1920(2). Some reporters charge a separate fee for attending the trial or hearing that they make a stenographic transcript of; others roll that fee into the fee for the transcript itself. Since the reporter cannot make the transcript without attending the hearing, the separate attendance fee is properly regarded as a component of the fee for the transcript. *Held v. Held*, 137 F.3d 998, 1002 (7th Cir.1998); *Finchum v. Ford Motor Co.*, 57 F.3d 526, 534 (7th Cir.1995); *Arrambide v. Wal-Mart Stores, Inc.*, 33 Fed.Appx. 199, 203 (6th Cir.2002) (per curiam).

There is greater merit to Extra's complaint about the award of translation fees. The statute refers to "compensation of court appointed experts, *compensation of interpreters*, and salaries, fees, expenses and costs of special interpretation services under [28 U.S.C. § 1828]." 28 U.S.C. § 1920(6) (emphasis added). (Section 1828 creates a program for the provision of interpretation services in federal criminal and habeas corpus proceedings.) The speci-

ficity of section 1920(6), and the character of section 1920 as a whole, makes us reluctant to interpret "interpreters" loosely to include translators of written documents, in this case the exhibits presented by Case at depositions and in support of its motion for summary judgment, and also the exhibits on its list of proposed trial exhibits. An interpreter as normally understood is a person who translates living speech from one language to another. He is a type of translator, see, e.g., *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 508-09, 46 S.Ct. 619, 70 L.Ed. 1059 (1926); *Gjerazi v. Gonzales*, 435 F.3d 800, 807 (7th Cir.2006); *Ememe v. Ashcroft*, 358 F.3d 446, 448 (7th Cir.2004), but the translator of a document is not referred to as an interpreter. Robert Fagles made famous translations into English of the *Iliad*, the *Odyssey*, and the *Aeneid*, but no one would refer to him as an English-language "interpreter" of these works.

We are mindful that the Sixth Circuit in *BDT Products, Inc. v. Lexmark Int'l, Inc.*, 405 F.3d 415, 419 (6th Cir.2005), held that the statute allows the award of costs for translating documents. (Other decisions have allowed such awards, but *BDT* is the only reported appellate decision that we have found in which the meaning of the statute was placed in question.) The only reason the court gave was that "the definition of interpret expressly includes to 'translate into intelligible or familiar language.' Webster's Third New International Dictionary 1182 (1981)." But the statutory term is "interpreters," not "interpret." The same dictionary defines "interpreter" (so far as might relate to the statute) as "one that translates; *esp:* a person who translates orally for persons who are conversing in different tongues." *Id.* The

qualification in "especially" leaves open the possibility that an interpretation can sometimes be of a document. And indeed it can be: a judge interprets statutes, and might sometimes (though rarely) be referred to as a statutory interpreter. But he is not a translator. If a judge translated the French Code of Criminal Procedure into English, we would not say that he had "interpreted" the French code into English.

There are plenty of loose interpretations; so we do not wish to deny the possibility of stretching section 1920 as far as urged by Case. But it would be a stretch, and there should be a good reason for disfiguring statutory language before wielding the knife, and there is not here. We cannot find a "spirit" in section 1920 that might guide an interpretation unmoored from the statutory language. The items allowable as costs are a hodgepodge. There is no purposive explanation for why some items are in and others out. To include translation fees would simply complicate the process of awarding court costs—the concern that underlies our rejection of Extra's attempt to avoid having to pay costs on the basis of Case's alleged "unreasonable delay" in interposing its determinative defense to Extra's suit. For while there is a natural limit to the expense of interpreters—the amount of time that witnesses (including deponents) undergo live examination—there is no natural limit on the number of documents that can be translated in aid of a claim or defense. A suit of the magnitude of Extra's suit (remember, it's almost seven years old) can generate millions of pages of documents. A large fraction of the documents in this case are in Portuguese, not to mention the countless pages of Brazilian statutes and cases

that might be relevant to the litigation. It is ominous that 65 percent of the costs awarded in this case were for translation, and of that amount only 11 percent was for interpretation. Was all that translation of written documents necessary? We do not think a district judge should be required to wade into such issues without a clearer directive from Congress. (Because this ruling creates a conflict with another circuit, we have circulated the opinion, in advance of issuance, to the entire court under 7th Cir. R. 40(e). No judge voted to hear the case en banc; Judge Flaum did not participate in the consideration of the matter.)

To summarize, the judgment for the defendant on the merits is affirmed. The award of costs is affirmed in part and reversed in part, and the matter of costs is remanded to the district court for redetermination.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

RIPPLE, Circuit Judge, concurring in part and dissenting in part.

The district court granted summary judgment in favor of Case with respect to both Extra's fraud and promissory fraud claims. The panel majority affirms the district court with respect to both counts. I join the panel majority's determination that the district court properly dismissed Extra's fraud claim. With respect to Extra's promissory fraud count, however, I would reverse the judgment of the district court and remand the case for trial.

I

A.

In this diversity action, Extra Equipamentos E Exportação, Ltda. ("Extra") asserts claims of fraud and promissory fraud against Case Corporation ("Case"). Case is a manufacturer of farm and construction equipment; Case Brasil is a wholly owned subsidiary of Case organized under the laws of Brazil. From 1992 until 2001, Extra operated as a distributor of Case equipment under a distribution agreement with Case Brasil (the "1992 distribution agreement").

In 1999, Case began having serious concerns about the allegedly illegal or improper conduct of executives at Case Brasil. From 1997 until 1999, Mario Hirose allegedly had been operating a "charge-back" scheme[1] to inflate both Case Brasil's profits and the bonuses of Case Brasil's management; Hirose also allegedly was extorting from Persio Briante, Extra's owner and president, R$50,000 per month as a condition for continuing the 1992 distribution agreement. Although Case became aware of, and was investigating, the alleged cor-

[1] The scheme operated as follows: Extra and other distributors had open accounts with Case Brasil that reflected the amounts owed by one entity to the other. As part of the scheme, Case Brasil would approve farm equipment loans for customers whom they knew could not pay off the loans. Whenever a customer defaulted on such a loan, Case Brasil's management would transfer these loans from Case Brasil's books to the open accounts kept with distributors like Extra. This resulted in losses to the distributor as well as a windfall to Case Brasil's management because it enabled management to inflate improperly their bonuses based on false sales figures.

ruption at Case Brasil, it was unable to garner sufficient evidence to terminate Hirose and his corrupt colleagues. In 1999, based on Hirose's corrupt conduct, Extra sued Case Brasil in Brazilian court.

At the same time that it was investigating Case Brasil executives, Case also was seeking to have a proposed merger approved by CADE, a Brazilian agency with the regulatory authority to approve business mergers. Extra had filed objections to the merger. Case was aware of these objections; indeed, at one time, Case executives met with Briante and his counsel regarding these objections. Briante's lawyer informed Brian Cahill, a senior in-house counsel at Case, that Briante was most concerned about alleged improper charge-backs to Extra's open account and that the CADE objections were filed to get Case's attention.

Cahill met with Briante in October 1999. On behalf of Case, Cahill had three issues to discuss: (1) additional information needed to fire Hirose and his associates; (2) objections to the pending merger; and (3) the charge-back issue. The parties could not resolve these issues; later, however, Briante's lawyer called Cahill to indicate Briante's interest in another meeting and also to express concern for Briante's safety if he should meet with Case people again in Brazil. It was therefore agreed that Briante would fly to the United States and would meet with Case management in an airplane hangar at an airport in Waukegan, Illinois.

The parties met in Waukegan. Extra was represented by Briante, who had with him Extra's Brazilian and American attorneys as well as Extra's financial advisor. Case was represented by James Sharman, Cahill and William Dietrick, a Case outside

attorney. Sharman introduced himself as a Case Vice-President and head of Case's Latin American operations. It is undisputed that Sharman is not an officer of Case Brasil. Cahill testified in a deposition that he did not inform Extra's representatives that Sharman was not an officer of Case Brasil.

After a full day of negotiations, the parties reached an agreement (the "Release"). The Release recites that it is between Extra and Case Brasil; James Sharman signed the Release on behalf of Case Brasil. Throughout this litigation, moreover, Case has maintained that the "actual party" to the Release was Case Brasil. R.173 at 1-2.

The Release contains a no-reliance clause:

> *No Reliance On The Other Party*: Both parties represent and warrant that in making this Release they are relying on their own judgment, belief and knowledge and the counsel of their attorneys of choice. The parties are not relying on representations or statements made by the other party or any person representing them except for the representations and warranties expressed in this Release.

R.157, Ex. 9 at 5-6. Under the terms of the Release, Case was assured of Briante's full cooperation and support in rectifying Case's problems with its Brazilian operations. Case Brasil, for its part, assured that it would provide to Extra a "standard" Case "Commercial Representative Agreement and Technical Services Agreement." *Id.*, Ex. 9 at 1. With respect to the charge-back issue, Case Brasil agreed to cap at R$2 million the total amount of monies that Extra owed to Case Brasil. In exchange, Extra dropped the suit that it had instituted in 1999 in Brazilian courts.

Additionally, Extra released all claims that it might have had against Case Brasil, including any claims regarding the charge-back scheme, Hirose's alleged extortion and objections to Case Brasil's then-pending merger.

Extra, in compliance with the terms of the Release, provided Case with information about the operations of Case Brasil, namely that Hirose was extorting money or other favors from Case dealers, which allowed Case to terminate Hirose's employment. Indeed, Sharman and Cahill flew to Brazil the following day to fire Hirose; other Case officials fired Hirose's staff.

At this point in the litigation, the record does not permit a definitive determination as to the extent to which Case Brasil failed to comply with the Release or whether Case Brasil repudiated the contract. According to Extra, Case Brasil has ignored, almost completely, its obligations under the Release by failing to tender proper Commercial Representative and Technical Services agreements to Extra. Case Brasil officers called the Release "stupid" and said that it "made no sense at all." In 2001, moreover, Case Brasil attempted to force Extra into signing a novation that would have released Case Brasil from its obligations under the Release. In that document, Case Brasil asked Extra to recognize a debt of R$10,365,000, despite the R$2 million cap set in the Release. After Extra refused to sign the novation, Case Brasil terminated Extra's line of credit and refused to sell to Extra any spare parts of Case equipment. Case Brasil informed Extra that Extra's credit would be restored if Extra signed the novation. According to Extra, Case Brasil executives repeatedly demanded that Extra desist from

attempting to enforce the terms of the Waukegan agreement and threatened Extra's position as a distributor of Case equipment if Extra did not comply with Case Brasil's demands.

Case, in contrast, contends that Case Brasil has performed fully and that termination of the 1992 distribution agreement was permissible under the terms of the distribution agreement itself and occurred only after negotiations to extend the agreement (through Case's tendering of the Commercial Representative and Technical Services agreements to Extra) had failed. In any event, Case contends, after Case Brasil's perceived breach of the 1992 distribution agreement, Extra sued Case Brasil in Brazil for wrongful termination; Brazil's highest court held that Case Brasil could terminate, although it might owe Extra some damages. This issue still is being litigated in Brazilian courts.

B.

Extra asserts claims of fraud and promissory fraud against Case. In our previous disposition in this case, we reversed the judgment of the district court, which had dismissed Extra's suit on the ground that Case Brasil was an indispensable party to the suit,[2] and remanded the case for further proceedings. *See Extra Equipamentos E Exportação v. Case Corp.*, 361 F.3d 359 (7th Cir.2004) [hereinafter *Extra I*]. In reversing the judgment of the district court, we noted repeatedly that Extra's suit was based on Case's alleged fraud in negotiating the

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[2] *See* Fed.R.Civ.P. 19. *See generally Republic of Philippines v. Pimentel*, — U.S. —, 128 S.Ct. 2180, 2184-85, 2188, 171 L.Ed.2d 131 (2008) (discussing changes to the 2007 amendments to Rule 19).

Release. *See id.* at 360-61, 362-63. Specifically, we noted that Extra was contending that Case had manipulated its corporate form to dupe Extra into signing the Release while concomitantly preserving Case Brasil's ability to repudiate the Release. *Id.* On remand, the district court denied Case's motion to dismiss. After the parties had conducted discovery, Case filed a motion for summary judgment.

The district court granted summary judgment on all claims based on the Release's no-reliance clause and on this court's decision in *Rissman v. Rissman*, 213 F.3d 381, 383-84 (7th Cir.2000).[3] In this case, the district court explained that *Rissman* applied only with "limited value" because a no-reliance clause "is typically a shield one party uses to deflect the opposing party's claims of fraud." R.174 at 8. Although the district court recognized that Case is not a party to the Release, which was between Case Brasil and Extra, it believed that "the non-reliance clause [nevertheless] bears on the critical issue" whether "Extra's reliance on Case's oral representations [was] reasonable[.]" *Id.* The court ruled that Extra's reliance on Case's representations was not reasonable, as a matter of law. In support of this determination, the district court explained that, when Extra met with Case to negotiate the Release, Extra was "under the impression" that Sharman was representing Case Brasil because both Sharman and Cahill had said so. As a result, Sharman was "any

[3] In *Rissman v. Rissman*, 213 F.3d 381, 383-84 (7th Cir.2000), we held that "a written anti-reliance clause precludes any claim of deceit by prior representations." *See also id.* at 388-89 (Rovner, J., concurring) (noting that this is not a per se rule and that courts should continue to apply a totality of the circumstances approach).

person representing" the parties, under the terms of the no-reliance clause. Under Illinois law, both fraud and promissory fraud require proof of reliance. Consequently, the district court dismissed both the fraud and the promissory fraud claim.

As relevant here, Case also had moved, in the alternative, for summary judgment with respect to Extra's promissory fraud[1] claim on the ground that Extra had no evidence of a scheme to defraud. The district court rejected this alternative basis for granting summary judgment. It concluded that "Extra has offered evidence to support its allegations of a scheme to defraud." *Id.* at 12. Specifically, the district court noted that according to Extra's owner, Persio Briante, as soon as Case got the information it wanted from Extra, it reneged on its various agreements. Specifically, Case failed to stop Case Brasil from terminating the distribution agreement with Extra. Briante also contends that Case allowed Case Brasil to pressure Extra into forfeiting either the $2 million cap on Case Brasil's liability or

[1] Under Illinois law, a plaintiff may prove promissory fraud by establishing all of the elements of fraud and, additionally, by establishing that the false statement concerns future conduct rather than an existing or preexisting material fact and that the false statement of future conduct is part of a pattern or scheme to defraud. *Steinberg v. Chi. Med. Sch.*, 69 Ill.2d 320, 13 Ill.Dec. 699, 371 N.E.2d 634, 640-41 (Ill.1977). The elements of fraud are: (1) the defendant made a false statement of material fact; (2) the defendant knew or believed that the statements were false, or the statements were made with a reckless disregard of whether they were true or false; (3) the statements were made with the intent to induce action; (4) the plaintiff reasonably believed the statements and justifiably acted in reliance on those statements; and (5) the plaintiff suffered damages as a result. *Kapelanski v. Johnson*, 390 F.3d 525, 530 (7th Cir.2004) (Illinois law).

risk Case Brasil terminating the distribution agreement (which Case Brasil eventually did). Evidence of a series of broken promises, even if the promises are all related, is sufficient to prove a scheme to defraud. *Id.* at 12-13.

Finally, the district court also declined to grant summary judgment with respect to the promissory fraud claim on the alternative ground that Extra could not establish proximate causation between Case's alleged misrepresentation and Extra's damages. *Id.* at 13-14.

II

A.

Extra contends that Case Brasil's promises as set forth in the Release (that Case Brasil would provide a commercial representative agreement to renew the 1992 distribution agreement and that it would cap Extra's liability for the charge-backs at R$2 million) were, as we explained in our previous opinion, the "bait dangled before Extra to persuade it" to provide evidence of Hirose's fraud and extortion, dismissing its then-pending Brazilian suit, releasing any future claims that it might bring against Case Brasil, and dropping its objections to Case Brasil's proposed merger. *Extra I*, 361 F.3d at 363. Indeed, as we explained in our prior opinion, Extra's theory of the case is that "Case . . . manipulated the corporate distinction between itself and Case Brasil by falsely representing that the Case official who signed the agreement [Sharman] was authorized to sign on behalf of Case Brasil." *Id.* at 360 (emphasis supplied) (internal quotation marks omitted).

The panel majority's application of the no-reliance clause simply ignores Extra's promissory fraud theory. Under Illinois law, *as a general matter*,"misrepresentations of intention to perform future conduct, even if made without a present intention to perform, do not generally constitute fraud." *HPI Health Care Servs. v. Mount Vernon Hosp., Inc.*, 131 Ill.2d 145, 137 Ill.Dec. 19, 545 N.E.2d 672, 682 (Ill.1989). Illinois courts, however, have "recognized an exception to this rule," under which "such promises are actionable if 'the false promise or representation of future conduct is alleged to be the scheme employed to accomplish the fraud.'" *Id.* (quoting *Steinberg v. Chi. Med. Sch.*, 69 Ill.2d 320, 13 Ill.Dec. 699, 371 N.E.2d 634, 641 (Ill.1977)); *see also Desnick v. Am. Broadcasting Cos., Inc.*, 44 F.3d 1345, 1354 (7th Cir.1995) ("Unlike most states nowadays, Illinois does not provide a remedy for fraudulent promises ('promissory fraud')—*unless they are part of a 'scheme' to defraud.*"(emphasis added)). Accordingly, a promissory fraud action, under Illinois law, requires that a plaintiff prove that (1) the defendant made a false and material statement concerning future conduct; (2) as part of a scheme to defraud; (3) knowing that the statements were false, or the statements were made with a reckless disregard of whether they were true or false; (4) the statements were made with the intent to induce action; (5) the plaintiff reasonably believed the statements and justifiably acted in reliance on those statements; (6) the plaintiff suffered damages as a result. *Kapelanski v. Johnson*, 390 F.3d 525, 530 (7th Cir.2004) (Illinois law); *Steinberg*, 13 Ill.Dec. 699, 371 N.E.2d at 641.

Based on the no-reliance clause, the district court granted summary judgment to Case with respect to both Extra's fraud and promissory fraud claims. The no-reliance clause, the district court determined, would prevent Extra, as a matter of law, from proving reliance, which is an element of both fraud and promissory fraud.

The district court erred, however, in dismissing Extra's promissory fraud claim on the basis of the no-reliance clause. Many of the fraudulent statements upon which Extra has predicated this suit are repeated and reenforced in the Release itself, and, *by its own terms*, the no-reliance clause does not apply to "representations and warranties expressed in" the Release. R.157, Ex. 9 at 5-6. For example, the Release specifically contains the following terms: Before October 1999, Case Brasil promises to provide to Extra standard Case Commercial Representative and Technical Services agreements; Case Brasil promises that any charge-backs made by Case Brasil against Extra's open account would be reversed; and Case Brasil promises that it will cap Extra's liabilities at R$2 million. R.157, Ex. 9. Because Extra's promissory fraud claim is predicated upon the "representations and warranties expressed in" the Release itself, the no-reliance clause, by its plain language, cannot prevent Extra from establishing reliance as a matter of law on that claim. R.157, Ex. 9 at 5-6.

In addition to adhering to the plain language of the no-reliance clause, this result is consistent with the policy justifications for strictly enforcing such clauses. By memorializing conclusively the terms governing a transaction, no-reliance clauses mitigate the risks of skullduggery and faulty memory. *Riss-*

man, 213 F.3d at 384. It allows the parties to "ensure[ ] that both the transaction and any subsequent litigation proceed on the basis of the parties' writings." *Id.* As the court in *Rissman* recognized, where a party has incorporated allegedly fraudulent terms into the agreement, these concerns are not implicated. *Rissman*, 213 F.3d at 383 (noting that the plaintiff who was suing for fraud did not contend that any misrepresentation in the agreement itself was untrue or misleading).

In sum, the panel majority's application of the no-reliance clause does not take into account Extra's promissory fraud claim. Extra claims that Case, as part of a scheme to defraud, has manipulated its corporate form—that is, the distinction between it and its subsidiary, Case Brasil—to dupe Extra into signing the Release and divulging information that Case needed while concomitantly scheming to ensure that Extra would not obtain the benefits of the Release. Having obtained from Extra the requisite information to fire Hirose and his corrupt associates as well as a blanket release of all claims, Case failed to ensure that Case Brasil follow the terms of the Release. The no-reliance clause cannot prevent Extra from proving reliance, as a matter of law, with respect to its promissory fraud claim.

The panel majority's opinion further obscures the importance of the foregoing analysis by faulting Extra for maintaining that it is seeking damages rather than rescission. *Supra* at 12. Extra's complaint and the Release itself, however, elucidate why Extra did not seek rescission as a remedy. As Illinois law recognizes, rescission of the Release cannot not place Extra in the *status quo ante* because the consideration that it tendered to Case cannot be recov-

cred. *See, e.g., Klucznik v. Nikitopoulos*, 152 Ill.App.3d 323, 105 Ill.Dec. 141, 503 N.E.2d 1147, 1150 (Ill.App.Ct.1987) ("[A] court will not grant rescission of a contract in any event where the *status quo ante* of the parties cannot be restored."); *see also Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l, Ltd.*, 1 F.3d 639, 641 (7th Cir.1993) ("A successful rescission action annuls the contract and returns the parties to the status quo ante."). As consideration for Case's (allegedly unfulfilled) promises set forth in the Release, Extra released *all* claims against Case Brasil, including the suit that it had instituted in 1999 regarding Case Brasil's charge-back scheme; the Release might also encompass any claims that Extra may have had for Hirose's extortion of Extra and Mr. Briante. Rescission would mean little to Extra if the Brazilian statute of limitations has expired or an equivalent to our laches doctrine prevents Extra from suing on these claims. Similarly, only damages can recompense Extra for the lost opportunity that it allegedly suffered when it agreed to divulge to Case information regarding Hirose and Case Brasil's corruption and to drop its objections to Case's then-pending merger. Rescission, in short, is "simply not feasible" in this case. *Jones v. InfoCure Corp.*, 310 F.3d 529, 535 (7th Cir.2002) (internal quotation marks and citation omitted).

B.

As discussed above, Illinois law requires that Extra, to win its promissory fraud claim, establish that Case engaged in a scheme to defraud. In discussing Illinois law, we have noted that "the distinction between a mere promissory fraud and a

scheme of promissory fraud is elusive, and has caused, to say the least, considerable uncertainty, as even the Illinois cases acknowledge." *Desnick*, 44 F.3d at 1354. Despite this uncertainty, we continued, "it is not our proper role as a federal court in a diversity suit to read 'scheme' out of Illinois law; we must give it some meaning." *Id.* We concluded: "Our best interpretation is that promissory fraud is actionable only if it either is particularly egregious or, what may amount to the same thing, it is embedded in a larger pattern of deceptions or enticements that reasonably induces reliance and against which the law ought to provide a remedy." *Id.*

The district court rejected Case's claim that it was entitled to summary judgment based on Extra's failure to proffer evidence with respect to this element of the promissory fraud claim. The district court believed that Extra has alleged sufficient evidence to create a genuine issue of material fact as to whether Case engaged in a scheme to defraud. According to Extra, Case reneged on various provisions of the Release as soon as it received the information that it sought from Extra. Moreover, Case allowed Case Brasil to ignore, almost completely, its obligations under the Release by failing to tender proper Commercial Representative and Technical Services agreements to Extra. Case Brasil officers called the Release "stupid" and said that it "made no sense at all." In 2001, Case Brasil attempted to force Extra into signing a novation that would have excused Case Brasil from its obligations under the Release. In that document, Case Brasil asked Extra to recognize a debt of R $10,365,000, despite the R$2 million cap set in the Release. After Extra refused to sign the novation, Case Brasil terminated Extra's

line of credit and refused to sell to Extra any spare parts of Case equipment. Case Brasil informed Extra that Extra's credit would be restored if Extra signed the novation. According to Extra, Case Brasil executives repeatedly demanded that Extra desist from attempting to enforce the terms of the Waukegan agreement and threatened Extra's position as a distributor of Case equipment if Extra did not comply with Case Brasil's demands.

Whether Extra has adduced sufficient evidence that Case engaged in a scheme to defraud is a close issue. Given that this action is before us on summary judgment and given that, contrary to Case's suggestions, the parties are disputing vigorously whether Case was complicit in Case Brasil's (alleged) failure to comply with the Waukegan agreement, Extra should be allowed to proceed with its promissory fraud claim. Extra has adduced sufficient evidence to allow a jury to conclude that Case engaged in a scheme with Case Brasil to dupe Extra into signing the Release and divulging the information that Case needed while concomitantly scheming to ensure that Extra would not obtain the benefits of the Release.

Conclusion

For the foregoing reasons, I would reverse the judgment of the district court with respect to Extra's promissory fraud claim and remand for a jury trial on that issue.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: September 3, 2008

BEFORE: RICHARD A. POSNER, Circuit Judge
KENNETH F. RIPPLE, Circuit Judge
ILANA DIAMOND ROVNER, Circuit Judge

Nos. 06-4389, 07-1794 and 07-2484

EXTRA EQUIPAMENTOS E EXPORTACAO LTDA.,
Plaintiff-Appellant,

—v.—

CASE CORPORATION,
Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 01 C 8591

Blanche M. Manning, Judge.

The judgment for the defendant on the merits is AFFIRMED. The award of costs is AFFIRMED in part and REVERSED in part, and the matter of costs is REMANDED to the district court for redetermination. The above is in accordance with the decision of this court entered on this date. Costs are awarded to the defendant.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

September 29, 2008

Before

Hon. Richard A. Posner, *Circuit Judge*
Hon. Kenneth F. Ripple, *Circuit Judge*
Hon. Ilana Diamond Rovner, *Circuit Judge*

Nos. 06-4389, 07-1794, 07-2484

EXTRA EQUIPAMENTOS E EXPORTACAO, LTDA.,
Plaintiff-Appellant,

—v.—

CASE CORPORATION,
Defendant-Appellee.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 01 C 8591

Blanche M. Manning, *Judge.*

ORDER

On September 17, 2008, plaintiff-appellant filed a petition for rehearing and petition for rehearing *en banc*. All of the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*.* The petition is therefore DENIED.

UNITED STATES DISTRICT COURT
N.D. ILLINOIS, EASTERN DIVISION

No. 01 CV 8591
May 24, 2007

EXTRA EQUIPAMENTOS E EXPORTAÇÃO LTDA.,
Plaintiff,

—v.—

CASE CORPORATION,
Defendant.

PAUL DOYLE, KELLEY, ANTONIA F. GIULIANA, DRYE & WARREN, New York, NY, DAWN MICHELE BEERY, MATTHEW CHARLES LUZADDER, Chicago, IL, for Plaintiff.

BRIAN DOUGLAS SIEVE, JAMES C. JOSLIN, MARIA A. MEGINNES, WENDY NETTER EPSTEIN, KIRKLAND & ELLIS LLP, Chicago, IL, for Defendant.

MEMORANDUM AND ORDER

BLANCHE M. MANNING, United States District Judge.

After prevailing on its motion for summary judgment, defendant Case Corporation seeks reim-

bursement for its costs of litigation to the tune of $246,295.79. Plaintiff Extra Equipamentos E Exportação Ltda. objects to most of those costs. For the reasons that follow, the court grants in part and denies in part Case's request for costs.

STANDARD

Federal Rule of Civil Procedure 54(d) provides that "[c]osts . . . shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed.R.Civ.P. 54(d). Recoverable costs include: (1) fees of the clerk; (2) fees for transcripts; (3) fees for printing and witnesses; (4) fees for copies of papers necessarily obtained for use in the case; (5) docket fees; and (6) compensation of court appointed experts and interpreters. *See* 28 U.S.C. § 1920. Rule 54(d) creates a strong presumption favoring the award of costs to the prevailing party. *See Weeks v. Samsung Heavy Indus. Co., Ltd.*, 126 F.3d 926, 945 (7th Cir.1997). "The presumption is difficult to overcome, and the district court's discretion is narrowly confined—the court must award costs unless it states good reasons for denying them."*Id.*

ANALYSIS

General Objection

Before turning to the specific items for which Case seeks costs, the court first addresses Extra's general objection to awarding costs at all. According to Extra, Case ultimately prevailed on a legal argument "that required no discovery and no litigation to resolve."The legal argument upon which Case pre-

vailed was that Extra could not establish fraud because it could not establish that its reliance on extra-contractual statements was reasonable given the existence of a non-reliance clause. Extra argues that if Case had raised that argument in a motion to dismiss rather than in a motion for summary judgment, most of Case's costs could have been avoided.

While costs will normally be awarded to a prevailing party, costs can be partially or completely denied if the prevailing party engaged in misconduct or bad faith that would justify denying costs as a penalty. *See Contreras v. City of Chicago*, 119 F.3d 1286, 1295 (7th Cir.1995); *see also EEOC v. Sears, Roebuck & Co.*, 114 F.R.D. 615, 620 (N.D.Ill.1987) (costs will be denied only "upon a showing by the losing party of the prevailing party's bad faith or misconduct"). Extra argues that Case's failure to raise the issue of the reasonableness of Case's reliance any earlier justified denying an award of costs, citing *Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F.2d 1, 11 (7th Cir.1949) (one basis for denying an award of costs would be the defendant's delay "in raising objection fatal to the plaintiff's case"). However, *Chicago Sugar* did not involve the delayed assertion of a defense. The only case Extra cites which denied costs based upon delay alone is *Harland v. Bankers' & Merchants' Tel. Co.*, 32 F. 305, 309 (S.D.N.Y.1887), in which the defendant failed to assert an obvious defense (lack of ownership) at any stage of the case. But the decision in *Harland* is at odds with the requirement set forth in more recent cases that only misconduct or bad faith would warrant denying a prevailing party its reasonable requests for costs. *See Contreras*, 119 F.R.D. at 1295; *Sears, Roebuck*, 114 F.R.D. at 620.

Although Extra asserts that Case unnecessarily delayed raising its reasonable reliance defense, Extra has offered no evidence that Case intentionally delayed for any dilatory purpose. In the absence of any evidence of misconduct or bad faith, Extra has failed to establish any basis for imposing upon Case the penalty of denying its reasonable requests for costs. Having concluded that Case is entitled to costs, the court will not examine the reasonableness of Case's requests.

Fees for the Court Reporter

Case seeks to recover court reporter fees in the amount of $23,475.74. Under 28 U.S.C. § 1920(2), costs for the "[f]ees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case" can be recovered. The total court reporter fees Case seeks consists of the following components: (1) court reporter appearance fees; (2) fees for copies of deposition transcripts; (3) fees for videotaping depositions; (4) fees for copies of court hearing transcripts; and (5) fees for copies of deposition exhibits. Extra does not object to the fees for copies of deposition transcripts and for the transcript of one court hearing, but does object to the remaining costs.

Court Reporter Appearance Fees

Although some courts have held that court reporter appearance fees cannot be recovered, those cases fail to acknowledge the Seventh Circuit's conclusion that they can be recovered if the court determines, in its discretion, that the costs were reasonable. *See Held v. Held*, 137 F.3d 998, 1002 (7th Cir.1998). Case has detailed the time spent and the

total appearance fee charged for each deposition, from which the court has determined, in its discretion, that the court reporters' hourly rates and total costs were reasonable. Therefore, Case is entitled to recover those fees.

Videotaping Fees

Costs for both written transcripts as well as videotaped recordings of depositions can be recovered if the videotaping was reasonably necessary. *See BCS Ins. Co., Inc. v. Guy Carpenter & Co., Inc.*, No. 04 C 3808, 2006 WL 695650, at * 2 (N.D.Ill. May 12, 2006) (awarding costs for both transcripts and videotapes for deponents located outside the court's subpoena power). The court agrees with Case that recording those depositions that were videotaped was reasonably necessary for two reasons. First, the deponents who were videotaped were outside the court's subpoena power, mostly in Brazil. *See Sembos v. Philips Components*, No. 00 C 4651, 2003 WL 22533579, at *1 (N.D.Ill. Nov.6, 2003) (videotaping a deponent who resided in England was reasonably necessary). Second, a number of the deponents testified in Portugese; memoralizing their testimony on videotape would help resolve any conflicts over subsequent translations.

Case also seeks costs for transferring the videotaped depositions to DVD, to which Extra objects. Neither side cites case law to support their view, though Case contends that the conversion costs were reasonable because DVD technology is "the preferred technology." If DVD technology was preferred, then Case should have hired a videographer who provides depositions on DVD to begin with, rather than incurring the additional expense of

transferring a videotape to DVD. With that in mind, the court concludes that the costs of transferring videotaped depositions to DVD was not reasonable, and those costs shall not be allowed.

Hearing Transcripts

Case seeks the cost for obtaining transcripts of five hearings before the magistrate judge on discovery matters. Case obtained one transcript—for a hearing on June 2, 2005—on an expedited basis because the hearing covered a wide range of discovery issues and because the parties had to meet and confer before a subsequent hearing scheduled for June 8, 2005. Extra does not object to the cost of that transcript, but contends that obtaining transcripts of four other hearings was not reasonably necessary. Case argues that the transcripts were necessary "to understand court orders regarding discovery motions," and to "compl[y] with the Court's guidance."

The court has reviewed those transcripts that Case attached to its reply memorandum, and finds nothing in them of a particularly complicated nature. In the court's view, note-taking during the hearing would have adequately memoralized the magistrate judge's guidance. Accordingly, the transcripts were unnecessary and the costs cannot be recovered.

Deposition Exhibits

Case also requests costs for making a copy of "official marked" deposition exhibits for use at later depositions and trial. Based upon the facts of this case including the number of depositions taken and

the number of exhibits used, costs of $496.30 are not unreasonable.

Witness Fees

Airfare Costs

Case seeks $10,500 in airfare for the cost of flying deponents from Brazil. Although the deponents apparently flew first-class, Case is seeking the approximate cost to fly economy class. Extra agrees that airfare is a recoverable cost, but objects to the amount Case seeks because Case based its estimate on the cost of refundable tickets. Extra contends that non-refundable tickets would have been more economical, and would have totaled only $4,628.40.

The prevailing party may recover travel expenses, but only for travel on "a common carrier at the most economical rate reasonably available." *See* 28 U.S.C. § 1821(c)(1). Because the non-refundable tickets for which Extra received quotes were more economical than the refundable tickets for which Case received quotes, Case's recoverable costs are limited to $4,628.40. The court acknowledges that for business travelers purchasing refundable tickets is often the norm given that meetings and flights must often be rescheduled. However, the court must interpret the phrase "most economical rate reasonably available" based upon its plain meaning. *See United States v. Davis*, 471 F.3d 783, 787 (7th Cir.2006). Under its plain meaning, the statute authorizes the recovery of no more than the cost of the most economical tickets, which based upon the facts of this case were the non-refundable tickets discussed above.

Hotel Costs

Case seeks $1,982 in hotel costs for its deponents based upon the applicable per diem allowed under law at the time. *See* 28 U.S.C. § 1821(d). Extra objects not to the per diem Case used, but to the number of nights each deponent stayed in their hotels. For instance, Caio Kugelmas was deposed on March 9, 2006, but spent four nights in a hotel—Extra argues that, even allowing for travel time, he needed at most two nights in a hotel. Similarly, Roque Reis was deposed over the course of two days, October 12 and 13, 2005, but spent six nights in a hotel—Extra argues that he needed no more than three nights. Finally, Valentino Rizziolli was deposed over the course of two consecutive days, but spent four nights in a hotel. In response, Case asserts that the deponents needed to spend the extra nights in Chicago in order to meet with Case's attorneys.

The court agrees with Extra that the costs for the additional nights are not reasonable. The additional days that the deponents spent in Chicago were for the convenience of Case and its counsel, and therefore those costs are not recoverable. *See Kittler v. City of Chicago*, No. 03 C 6992, 2006 WL 1762036, at *3 (N.D.Ill. June 26, 2006) ("attorney convenience is not a sufficient basis for recovering costs."). Case is entitled to recover the costs for two nights' lodging for Kugelmas, and three nights each for Reis and Rizziolli. The additional nights' lodging is not recoverable.

Expert Witness Expenses

Case seeks the costs for the deposition of its expert witness, Den Uyl, as well Uyl's time spent preparing for his deposition. Extra does not contest Uyl's hourly rate or the time billed for his actual deposition, and agrees this amounts to $5,325. However, Extra does object to the cost for the expert's "deposition preparation," which totals $29,690.

Generally, an expert's time spent preparing for his deposition is not a recoverable cost. *See Rhee v. Whitco Chem. Corp.*, 126 F.R.D. 45, 47 (N.D.Ill.1989). However, for complex cases which require the expert to review "voluminous documents," a court may, in its discretion, award preparation costs. *Id.* As an example, in *Rhee*, Judge Norgle opined that preparation fees might be recoverable where a deposition had been repeatedly rescheduled to the point where it finally occurred long after the expert had prepared his report, requiring the expert to repeatedly refresh his recollection by reviewing voluminous documents. *Id.* Other decisions awarding preparation costs conclude cursorily that the case was complex, without describing the level of complexity needed to support an award of preparation costs. *See, e.g., McClain v. Owens Corning Fiberglass Corp.*, No. 89 C 6226, 1996 WL 650524, at *3 (N.D.Ill. Nov. 7, 1996) (concluding cursorily that the case was complex); *EEOC v. Sears, Roebuck & Co.*, 138 F.R.D. 523, 526 (N.D.Ill.1991) (same). However, in those decisions the courts noted that the prevailing party had retained multiple experts.

The parties have offered no evidence upon which the court can conclude that this case was complex or that preparation costs are justified. There is no evidence that Uyl's deposition was repeatedly

rescheduled, or that it occurred long after he prepared his expert report. *See Rhee*, 126 F.R.D. at 47. There is no evidence that the same was so complex that either side retained multiple experts. *See Sears, Roebuck*, 138 F.R.D. at 526. To the contrary, based upon its review of the complaint and the evidence submitted during briefing of Case's motion for summary judgment, this case presented nothing more than run-of-the-mill fraud claims, albeit claims involving an international cast.

Furthermore, from the information provided by Case it appears that a significant portion of the "voluminous documents" that Uyl reviewed in preparation for his deposition were the same documents that he had already reviewed to prepare his expert report. For instance, Uyl states in a declaration that he reviewed 35,000 pages of Bates-numbered documents produced by the parties in discovery, the same documents he had previously reviewed "[i]n order to prepare my opinions in this matter."

Because the claims involved in this case were not particularly complex, because much of what Uyl reviewed before his deposition was the same universe of documents he had previously reviewed to prepare his report, and because Case made no effort to single out the costs for Uyl's review of new documents as opposed to previously-reviewed documents, the costs for Uyl's deposition preparation are inappropriate and denied.

Copying Costs

Case seeks the cost for making copies. Extra does not object to the costs of copying "documents for discovery" (totaling $5.94) or for Bates stamping (totaling $1,102.31), but does object to portions of

the costs for copying the following categories of documents: (1) two sets of copies of documents Case produced to Extra; (2) one set of copies of correspondence; (3) four sets of copies of pleadings; (4) three sets of deposition exhibits and two sets of trial exhibits; and (5) 472,186 "miscellaneous" copies.

The cost of copies to be retained by the prevailing party cannot be recovered. *See Craven v. City of Chicago*, No. 97 C 8845, 2001 WL 62573, at *2 (N.D.Ill. Jan. 25, 2001). Accordingly, Case can recover the cost of only one set of the discovery documents it produced to Extra, not the second set it retained. Likewise, it cannot recover for the cost of retaining a copy of its correspondence, pleadings, deposition exhibits or trial exhibits. However, it can recover for the cost of pleadings actually filed with the clerk and courtesy copies provided to the court (including two sets of copies of summary judgment materials as required by the court's standing order).

As for the staggering number of "miscellaneous" copies, the cost of which totals $47,396.58, those costs are denied. While Case provided a description of the type of work its counsel was performing during some of the months when these costs were incurred, it has made no effort to describe what these "miscellaneous" copies were. Although Case is correct that it does not need to "submit a bill of costs so detailed as to make it impossible economically to recover photocopying costs," the court needs at least some explanation in order to determine whether the costs are reasonable. *See Am. Auto. Accessories, Inc. v. Fishman*, 991 F.Supp. 995, 997 (N.D.Ill.1998). In the absence of *any* expla-

nation what the copies were, the request for the cost of 472,186 "miscellaneous" copies is denied.

Interpretation and Translation Costs

Case seeks $9,800 for interpretation costs incurred during depositions and $114,791.14 for having documents translated from Portugese into English. Extra does not object to the interpretation costs, so the court will review only the request for translation costs.

Translation costs are recoverable under 28 U.S.C. § 1920(6), except when the translation was performed solely for investigational purposes. *See Baxter Int'l, Inc. v. McGaw, Inc.*, No. 95 C 2723, 1998 WL 102668, at *9 (N.D.Ill. Mar. 3, 1998). Extra concedes that the cost to translate exhibits used at deposition, summary judgment, or included on Case's trial exhibit list are recoverable. Case has prepared charts summarizing the translations costs for that universe of documents, which total $75,722.04. The court has reviewed Case's charts and corresponding invoices and determines, in its discretion, that its calculations are supported by the evidence submitted. Accordingly, Case is awarded the $75,722.04 spent translating exhibits used at deposition, summary judgment, or included on Case's trial exhibit list.

As for the remaining $40,000 that Case spent on document translations, Case argues that the translations were needed "for defensive purposes" and "to identify, in the first instance, which Portuguese documents might be candidates for deposition or summary judgment exhibits."Case's argument is similar to the one rejected in *Baxter*, where the defendant attempted to recover the costs to translate

documents that "were necessary because, without [the translations], McGaw's counsel could not determine whether [the documents] provided important evidence for the case." *Id.* Because the costs for investigational translations are not recoverable, the court in *Baxter* rejected the request for costs, as this court must reject Case's similar request.

CONCLUSION

The court has detailed the category of costs that can be recovered and those that cannot. The parties are directed to confer and draft an agreed order on costs in accordance with the court's ruling for presentation to the court. The agreed order shall be filed with the clerk (and a courtesy copy shall be delivered to chambers) no later than June 8, 2007. If the agreed order meets with the court's approval, it will be entered without the need for counsel's appearance.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge
Blanche M. Manning

Case Number
01 CV 8591

Date
March 26, 2007

Case Title
Extra Equipamentos E Exportação Ltda. v. Case Corp.

Docket Entry Text

Plaintiff Extra Equipmentos's motion for reconsideration [177-1] is denied. The court will rule on the pending motion for a bill of costs at a later date.

STATEMENT

Plaintiff Extra Equipmentos has moved for reconsideration of this court's order of November 27, 2006, granting summary judgment to defendant Case Corporation. *See* Federal Rule of Civil Procedure 59(e). Extra identifies three reasons why the court should grant its motion for reconsideration. First, Extra contends that the court's order granting summary judgment was premised on a manifest error of

law. Second, it contends that newly discovered evidence precludes summary judgment. Third, it contends that a manifest injustice would result if the court's order is not vacated.

Motions for reconsideration are disfavored. *See Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir. 1990). They afford the moving party the opportunity to apprise the court that it has patently misunderstood a party, or of a controlling or significant change in the law or facts. *See In the matter of Prince*, 85 F.3d 314, 324-25 (7th Cir. 1996). They are not an opportunity to revive previously rejected arguments. *Quaker Alloy Casting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282, 288 (N.D. Ill. 1988).

As background, Extra had a long-standing dispute with Case's Brazilian subsidiary, Case Brasil. Case brought the parties together to settle the dispute under terms set forth in an agreement that has come to be known as the Waukegan agreement. Extra contends that the subsidiary reneged on its obligations under the Waukegan agreement, most notably by terminating its distributorship agreement with Extra. That claim is still being litigated in Brazil. In addition to its suit against Case Brasil in Brazil, Extra also sued Case in the instant suit for fraud and promissory fraud. The crux of those claims is that during the negotiation of the Waukegan agreement, Case falsely assured Extra that Case Brasil would comply with the terms of the Waukegan agreement. Extra also contends that Case vice-president James Sharman signed the Waukegan agreement on Case Brasil's behalf when, in fact, he lacked authority to do so.

The court determined that Case was entitled to summary judgment because Extra could not establish an element common to both its fraud and promissory fraud claims—reasonable reliance. The court concluded that Extra's reliance on statements made by Sharman and others was not reasonable because Extra had previously disavowed any reliance on those very statements. Alternatively, the court concluded that Extra could not establish proximate causation on its fraud claim because there is no evidence that Case Brasil ever denied that Sharman had authority to bind it to the Waukegan agreement, or ever repudiated the agreement.

Manifest Error of Law

With all that in mind, the court addresses each of Extra's bases for reconsideration in turn. First, Extra argues that the court erred by concluding that Extra's reliance on statements made by Sharman and others during the negotiation of the Waukegan agreement was unreasonable. The court based its conclusion on a "no reliance" clause within the Waukegan agreement. Under the terms of the "no reliance" clause, Extra represented that it was "relying on [its] own judgment, belief and knowledge" and was "not relying on representations or statements made by the other party or any person representing them." It is undisputed that at the time Extra entered into the Waukegan agreement, it operated under the impression that "the other party" was Case Brasil, and that "any person representing them" was Sharman. Therefore, Sharman's statements were among those that Extra represented in the "no reliance" clause that it was *not* relying upon. Any subsequent reliance upon those statements

would, as a matter of law, be unreasonable. *See BP Amoco Chem. Co. v. Flint Hills Resources, LLC*, No. 05 CV 5661, 2006 WL 2505691, at *6 (N.D. Ill. Aug. 25, 2006) ("Reliance is typically an issue of fact, but it can be dealt with as a matter of law when, as here, no trier of fact could find the reliance to be reasonable.")

Extra argues that the court should not have taken into account the "no reliance" clause because (1) the clause was part of an agreement between Extra and Case Brasil, not between Extra and Case, and therefore Case cannot use the clause against Extra and, (2) Sharman actually represented Case, not Case Brasil, and therefore his statements did not fall within the scope of the clause, which disclaimed reliance only upon statements made by Case Brasil or its representatives.

Extra's arguments are unavailing for two reasons. First, they are the same arguments the court has already rejected. *See Quaker Alloy Casting*, 123 F.R.D. at 288 (motions for reconsideration are not vehicles for rehashing old arguments). Second, Extra's argument misapprehends the effect of the "no reliance" clause. The court did not hold that Case could enforce the clause against Extra. Rather, the court merely took into account the representation that Extra made in the clause that it was not relying on statements made by "the other party or any person representing them," and the fact that, at the time, Extra was under the impression that "any person representing" the other party included Sharman. Accordingly, at the time, Extra represented that it was not relying on Sharman's statements. In that light, Extra cannot now claim that its reliance upon Sharman's statements was reasonable.

Because Extra cannot establish reasonable reliance —an element of both its fraud and promissory fraud counts—Case was entitled to summary judgment.

Alternatively, Extra argues that the only reason it was under the impression that Sharman represented Case Brasil was "because Case defrauded Extra into believing it." Therefore, it contends, the court should not have concluded that Extra's reliance upon Sharman's statements was unreasonable because it "rewards Case's fraud." However, had Extra been under the impression that Sharman represented only Case and not Case Brasil, then there would be no Waukegan agreement at all because no one could have signed it on Case Brasil's behalf. As the court noted in its order granting summary judgment, the "damages Extra has described in its pleadings flowed from Case Brasil's termination of its distributorship agreement with Extra." Without a Waukegan agreement validly signed by Case Brasil, Extra would have no damages and no claims. Therefore, Extra's argument that the court's order rewards Case's fraud is unpersuasive.

Extra also argues that the court's conclusion that its reliance was unreasonable was contrary to the law of the case. According to Extra, the Seventh Circuit has already determined that Extra's claims of fraud "are based on misrepresentations made by Case—not Case Brasil—and that those fraud claims are not dependent on the terms of the Waukegan Agreement. . . ." Extra Brief in Support of Motion for Reconsideration at 8. The Seventh Circuit opinion to which Extra refers reviewed the issue of whether Case Brasil was an indispensable party to Extra's claims against Case. *See Extra Equipamentos E Exportação Ltda. v. Case Corp.*, 361 F.3d 359 (7th

Cir. 2004). This court initially concluded that Case Brasil was indispensable and granted Case's motion to dismiss on that basis. In doing so, the court accepted Extra's allegations as being true, as did the Seventh Circuit when it reviewed this court's dismissal order. *See Metropolitan Water Reclamation Dist. of Greater Chicago v. North Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 825 (7th Cir. 2007) (on a motion to dismiss, the court accepts as true all well-pleaded facts). At no point did the Seventh Circuit engage in fact-finding and determine that the misrepresentations alleged by Extra were made by Case rather than Case Brasil. Nor did it have occasion to address whether Extra believed that Sharman was authorized to represent Case Brasil, or whether the "no reliance" clause sheds light on the reasonableness of Extra's reliance on Sharman's statements. Therefore, this court's determinations regarding those issues are not contrary to the law of the case.

Newly-Discovered Evidence

In its order granting summary judgment, the court set forth an alternative basis for granting summary judgment to Case on Extra's fraud count: Extra could not establish that Case's fraud (misrepresenting Shainuan as a representative of Case Brasil) proximately caused Extra's damages. In support, the court noted that Extra had failed to present any evidence that Case Brasil had ever repudiated the Waukegan agreement on the basis that Sharman lacked authority to sign the agreement on its behalf. Therefore, the court concluded, Extra could not show that Case's alleged misrepresentation about Sharman's authority caused it any damages. Extra

now offers "new" evidence that Case Brasil repudiated the Waukegan agreement on the basis that Sharman lacked authority to bind Case Brasil to the agreement. The evidence takes the form of deposition testimony from Rubens Gasparian, one of Extra's attorneys, and Flavia Salem Goncalves, the wife of Extra's chief executive officer and principal shareholder. Their depositions occurred in November 2006, after the motion for summary judgment had been fully briefed but before the court granted the motion.

To support a motion for reconsideration based upon newly discovered evidence, the moving party must show not only that the evidence is new, but also that reasonable diligence could not have uncovered it any earlier. *See Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1269-70 (7th Cir. 1996). Extra does not dispute that both deponents were under its control and could have been deposed earlier. Instead, it argues that it failed to appreciate the significance of the basis for Case Brasil's alleged repudiation of the Waukegan agreement until the court addressed it *"sua sponte."* Extra is wrong. Case raised the issue in its opening brief in support of its motion for summary judgment: "Case Brasil has ***never*** sought to evade the enforceability of the Waukegan Agreement on the grounds that Mr. Sharman lacked authority to bind Case Brasil (or for any other reason)." Case Brief in Support of Motion for Summary Judgment at 17. Therefore, the basis for Case Brasil's termination is not an issue the court addressed *sua sponte*, and Extra had the same opportunity to address that issue as it had to address the other issues raised by Case in its motion for summary judgment. Therefore, Extra's

evidence is not *new* evidence entitling it to reconsideration. *See Caisse Nationale*, 90 F.3d at 1269-70 (the moving party must show that the evidence could not with reasonable diligence have been discovered and produced during the pendency of the underlying motion).

Manifest Injustice

Finally, Extra argues that it would suffer a manifest injustice should the court's order granting summary judgment to Case stand. The manifest injustice that Extra identifies is the five years and $2.6 million the plaintiffs invested in this case. Extra offers no authority to support its proposition that it should be immune from summary judgment based upon the amount of time and money it expended. The fact remains that Extra cannot establish a critical element of its claims—reasonable reliance—and therefore is not entitled to proceed to trial on those claims. To hold otherwise and permit this case to proceed to trial would needlessly waste even more of the parties' time and money, not to mention the resources of the federal courts.

CONCLUSION

For the reasons given, Extra's motion for reconsideration [177-11] is denied.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 01 CV 8591
Hon. Blanche M. Manning

EXTRA EQUIPAMENTOS E EXPORTAÇÃO LTDA.,
Plaintiff,

—v.—

CASE CORPORATION,
Defendant.

MEMORANDUM AND ORDER

Plaintiff Extra Equipamentos E Exportação Ltda. sold farm and construction equipment in Brazil. Much of the equipment it sold was manufactured by Case Corporation, the defendant in this case, which Extra obtained through Case's Brazilian subsidiary, Case Brasil & Cia, which is not a party. Over the years, Extra's relationship with the subsidiary soured. Case, the parent company, attempted to shore up the relationship between Extra and Case Brasil by facilitating a settlement agreement between those two entities. But despite Case's inter-

vention, the relationship between Extra and the Brazilian subsidiary continued to deteriorate until finally, in 2002, Case Brasil terminated its distribution agreement with Extra. Extra responded by suing Case Brasil in Brazil for breach of the distribution agreement, and Case in this court for fraud and promissory fraud for duping it into signing the settlement agreement with Case Brasil. Case has filed a motion for summary judgment which, for the reasons that follow, the court grants.

BACKGROUND

Case is a Delaware corporation headquartered in Wisconsin (Case has since changed its name, but to avoid confusion the court will stick with the parties' names as of the time of the filing of this action). Case operated a number of subsidiaries throughout the world in order to distribute its equipment overseas. One of those subsidiaries operated in Brazil, known as Case Brasil. Case Brasil was overseen by Case's Latin American Region group, and the Case vice-president who served as the general manager of the Latin American Region group was James Sharman.

Beginning in 1992, Case Brasil entered into a distribution agreement with a Brazilian company known as Extra to sell Case's construction and farm equipment in Brazil. But by 1999, Extra had become suspicious about some of the activities of senior executives at Case Brasil. Specifically, Extra believed that the executives at Case Brasil were overcharging Extra, and pocketing the difference. Extra responded by suing Case Brasil in a Brazilian court.

When Case learned that Extra had sued its Brazilian subsidiary, Case grew concerned that its ability to sell its products in Brazil might be in jeopardy. In an attempt to salvage the relationship between Extra and Case Brasil, Case intervened. It succeeded in convincing Extra to drop its lawsuit after entering into a settlement agreement.

The parties agree that the settlement document was negotiated and signed in Waukegan, Illinois, but on whose behalf the document was signed, and whether the parties who signed had authority to do so is the subject of debate. The Waukegan agreement purports to be between Extra and Case Brasil, the Brazilian subsidiary. The person who signed on behalf of Case Brasil was James Sharman. According to Case, Sharman had authority to sign on behalf of Case Brasil because he was the vice-president and general manager of the Latin American Region group, of which Case Brasil was a part. Extra disagrees. It contends that Sharman was an executive of Case, not Case Brasil, and therefore had no authority to sign on behalf of Case Brasil. Despite the parties' disagreement about whether Sharman had authority to bind Case Brasil to the Waukegan agreement, nothing in the record suggests that Case Brasil ever repudiated the agreement on the basis that Sharman was not authorized to sign on its behalf.

Under the terms of the Waukegan agreement, Extra agreed to drop its Brazilian lawsuit against Case Brasil. It also agreed to help Case clean house within its Brazilian subsidiary by identifying the corrupt senior executives at Case Brasil so that Case could fire them. In exchange, Case Brasil agreed to continue using Extra as a distributor under the

terms of their existing distribution agreement, to attempt to negotiate an extension of the distribution agreement on terms as favorable as offered to other distributors, to correct the earlier overcharges, and to seek no more than $2 million in past-due payments that Extra owed Case Brasil.

The parties disagree about the extent to which Case Brasil performed under the Waukegan agreement. Extra contends that Case Brasil has almost completely ignored its obligations under the agreement by, among other things, terminating the parties' distribution agreement despite assurances in the Waukegan agreement that the distribution arrangement would continue. Case, on the other hand, contends that Case Brasil has fully performed, and that termination was permitted under the terms of the distribution agreement and occurred only after negotiations to extend the agreement failed.

Extra sued Case Brasil in Brazil for wrongful termination of the distribution agreement. A Brazilian court initially enjoined Case Brasil from terminating the distribution agreement. But that decision was reversed by Brazil's highest court, which held that Case Brasil could terminate, though it might owe Extra some damages, an issue still being litigated. According to the order (Extra has not objected to Case's translation):

> not even the Judiciary can impose the continuation [of the distribution agreement] when one of the parties has already stated its desire not to continue in it any longer, it being true that, when the termination is abusive, if applicable, whoever is guilty will be held liable, but everything will be resolved within the framework of indemnification.

October 30, 2002, Order of the Superior Court of Justice of Brazil (Appendix to Case's Motion For Summary Judgment at Ex. 26).

At the same time it sued Case Brasil for breach of the distribution agreement, Extra filed the instant suit against Case for breach of the Waukegan agreement, negligent misrepresentation, fraud, and promissory fraud. The claims for breach of contract and negligent misrepresentation have since been abandoned or dismissed, leaving only claims for fraud and promissory fraud. The fraud claim is premised on statements made by Sharman and Brian Cahill, a Case attorney, that Sharman had full authority to bind Case Brasil to the Waukegan agreement, a representation repeated in the agreement itself. The promissory fraud claim is premised on alleged promises made by Case representatives during the Waukegan meeting. According to the amended complaint, during the meeting Sharman and unidentified others committed to cause Case Brasil to fulfill its obligations under the Waukegan agreement. Specifically, Case, through Sharman and others, allegedly promised that: (1) Case Brasil would retain Extra as a distributor under the terms of the 1992 distribution agreement until new agreements could be signed; (2) Case Brasil would tender to Extra proposed agreements to extend their distribution relationship on terms as favorable as those offered to Case Brasil's other distributors; (3) Case Brasil would cap Extra's outstanding debt at $2 million; and (4) Case Brasil would provide to Extra a Portuguese translation of the Waukegan agreement (which had been executed in English). Thus, according to the complaint, Extra received not only Case Brasil's written commitments in the Waukegan

agreement, but also Case's oral assurances that Case Brasil would fulfill its commitments. According to Extra, it entered into the Waukegan agreement based upon Case's oral assurances, not realizing that at the time Sharman and others made those assurances, Case had no intention of honoring them.

Case has moved for summary judgment on Extra's claims for fraud (Count I) and promissory fraud (Count III). In support, Case argues that it is entitled to judgment on those counts because a non-reliance clause in the Waukegan agreement undermines Extra's ability to prove that its reliance on any misrepresentations was reasonable, a required element of both the fraud and promissory fraud claims. Case argues that it is also entitled to summary judgment on the fraud and promissory fraud claims for these additional reasons: (1) Extra cannot establish its claim of fraud (Count I) because Sharman was authorized to sign the Waukegan agreement on behalf of Case Brasil and so no fraud occurred; (2) Extra has no evidence of a "scheme to defraud," an element required to establish a claim of promissory fraud (Count III); and (3) Extra cannot establish any proximate causation between the alleged misrepresentations and the damages it alleges.

ANALYSIS

1. Summary Judgment Standard

Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*,

477 U.S. 317, 322 (1986). "The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Valenti v. Qualex, Inc.*, 970 F.2d 363, 365 (7th Cir. 1992), *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Moreover, a court may grant a motion for summary judgment only when the record shows that a reasonable jury could not find for the nonmoving party. *Valenti*, 970 F.2d at 365; *Anderson*, 477 U.S. at 248.

Accordingly, the nonmoving party may withstand summary judgment only by showing that a dispute over a "genuine" material fact exists; that is, the evidence is such that a reasonable jury could render a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248. The nonmoving party may not merely rest upon the allegations or details in his pleading, but instead, must set forth specific facts showing that there is a genuine issue for trial. *Celotex*, 477 U.S. at 322; *Anderson*, 477 U.S. at 248.

2. Non-Reliance Clause

Case argues that it is entitled to summary judgment on both of Extra's fraud claims based upon the existence in the Waukegan agreement of a non-reliance clause. Specifically, the clause states the following:

> No Reliance On The Other Party. Both parties represent and warrant that in making this Release they are relying on their own judgment, belief and knowledge and the counsel of their attorneys of choice. The parties are not relying on representations or statements made by the other party or any person representing them

> except for the representations and warranties expressed in this Release.

Waukegan Agreement (Appendix to Case's Motion For Summary Judgment at Ex. 10, § 12.) Extra does not dispute that the clause exists or that its owner, Persio Briante, signed the agreement and initialed the page on which the clause appears. According to Case, in light of the non-reliance clause, Extra cannot establish that its reliance upon any misrepresentation Case made was reasonable, an element common to both of its claims.

The elements of a claim of fraud under Illinois law (which the court previously held governs Extra's fraud claims) are (1) a false statement of material fact, (2) the defendant knew the statement was false, (3) the defendant intended that the plaintiff rely on the statement, (4) the plaintiff reasonably relied on the statement, and (5) the plaintiff was damaged by its reliance. *See Geschke v. Air Force Assn*, 425 F.3d 337, 345 (7th Cir. 2005) (applying Illinois law). The elements of promissory fraud are similar, except that (1) the false statement concerns future conduct rather than an existing material fact, and (2) the misrepresentation must be part of a pattern or scheme to defraud. *See Steinberg v. Chi. Med. Sch.*, *371* N.E.2d 634, 640-41 (Ill. 1977) (distinguishing between fraud based upon misstatements of existing facts and fraud based upon false promises of future conduct); *see also Weeks v. Samsung Heavy Indus. Co., Ltd.*, 126 F.3d 926, 942 (7th Cir. 1997) (promissory fraud is actionable only if the fraudulent statement reasonably induced reliance); *Int'l Star Registry of Ill. v. ABC Radio Network, Inc.*, 451 F. Supp. 2d 982, 988 (N.D. Ill. 2006) (same). As can be seen, both causes of action require that

the plaintiff's reliance upon the defendant's misrepresentation was reasonable.

In order to guard against claims of fraud, contracting parties often include in their agreement a written non-reliance clause. In a non-reliance clause, parties confirm that the only representations they relied upon in deciding to enter into the contract are the ones that appear within the contract. *See Rissman v. Rissman*, 213 F.3d 381, 383-84 (7th Cir. 2000). Such clauses typically disclaim any reliance on prior oral statements. *Id.* As the Seventh Circuit noted, a nonreliance clause "ensures that both the transaction and any subsequent litigation proceed on the basis of the parties' writings, which are less subject to the vagaries of memory and the risks of fabrication." *Id.* at 384. Even though one state's law may govern the contract (the Waukegan agreement purports to be governed by the laws of Brazil), it is the law that governs the fraud claim that determines the legal effect of the non-reliance clause. *See Vigortone AG Prods., v. PM AG Prods.*, 316 F.3d 641, 642-44 (7th Cir. 2002) (Delaware law governed contract, but the effect of the non-reliance clause found in the contract was governed by Illinois law, the law that applied to the fraud claim).

In order to abide by the intent of parties who include non-reliance clauses in their contracts, the Seventh Circuit held that "a written anti-reliance clause precludes any claims of deceit by prior representations." *Rissman*, 213 F.3d at 384. There are exceptions, such as when parties to the contract containing the clause were unsophisticated, and might not have understood what they were agreeing to. *See Vigortone*, 316 F.3d 641, 645 (7th Cir. 2002) (enforcing non-reliance clause because it was nego-

tiated by sophisticated commercial enterprises); *Rissman*, 213 F.3d at 388 (Rovner, J., concurring) (non-reliance clause might not be a safe harbor in every case because "not all principals of fiduciaries are competent adults; not all disclaimers are clear. . .") But, by all accounts, Extra and Case Brasil are sophisticated commercial enterprises, so the concerns expressed by Judge Rovner in her concurrence in *Rissman* are inapplicable.

A non-reliance clause is typically a shield one party uses to deflect the opposing party's claims of fraud, yet Case was not a party to the Waukegan agreement where the non-reliance clause appears. Because the non-reliance clause at issue was not negotiated by the party trying to use it against Extra, the rationale expressed in *Rissman* for enforcing the clauses as bargained-for terms of the parties' agreement holds limited value. Nevertheless, the non-reliance clause still bears on the critical issue before the court: was Extra's reliance on Case's oral representations reasonable? The court concludes that, as a matter of law, it was not.

In the non-reliance clause, Extra affirmatively stated that it was not relying on any extra-contractual "representations or statements made by the other party or any person representing them." The question then becomes, were the fraudulent statements that Extra has alleged Sharman made statements "made by the other party or any person representing them?" According to Extra's amended complaint, at the time it signed the Waukegan agreement, Extra was under the impression that Sharman was representing Case Brasil because both Sharman and a Case attorney said he was. Therefore, from Extra's perspective at the time it signed the

Waukegan agreement, statements made by Sharman would have been within the scope of the non-reliance clause.

Given that Sharman's representations were within the scope of the non-reliance agreement, and Extra affirmatively stated within the agreement that it was not relying on those representations, Extra's subsequent reliance on those representations could not have been reasonable. While reliance is typically an issue of fact, it becomes a matter of law when the issue of reliance is subject to a non-reliance clause. *See BP Amoco Chem. Co. v. Flint Hills Resources, LLC*, No. 05 CV 5661, 2006 WL 2505691, at *6 (N.D. Ill. Aug. 25, 2006) ("Reliance is typically an issue of fact, but it can be dealt with as a matter of law when, as here, no trier of fact could find the reliance to be reasonable.") As discussed above, by all accounts Extra is a sophisticated commercial entity. It is undisputed that Extra had ample legal counsel present while negotiating the terms of the Waukegan agreement, and there is no evidence that Extra did not agree to the Waukegan agreement's terms or did not understand what it was signing. In light of the non-reliance clause in the Waukegan agreement and the undisputed facts about Extra's involvement in negotiating the clause, the court concludes as a matter of law that Extra's reliance on any statements outside the agreement was unreasonable.

In an effort to escape the effect of the non-reliance clause, Extra argues that lack of reasonable reliance is an affirmative defense that Case forfeited by not asserting the defense in its answer. However, as noted above, reasonable reliance is an element of Extra's fraud claim, and therefore in this case lack

of reliance is not an affirmative defense. *See Tripodi v. Microculture, Inc.*, 397 F. Supp. 2d 1308, 1314 (D. Utah 2005) (distinguishing between element of the plaintiff's claims and affirmative defenses to the claim); *Duncan v. Consol. Freightways Corp. of Delaware*, No. 94 CV 2507, 1995 WL 530652, at *4 (N.D. Ill. Sept. 7, 1995) (proof that simply negates an element of the plaintiff's claim is not an affirmative defense that is waived if not timely raised).

Accordingly, Extra cannot establish reasonable reliance under either fraud claim and, therefore, Case is entitled to summary judgment on those claims.

3. Other Bases

Although the court has already concluded that Case is entitled to summary judgment based upon the non-reliance clause in the Waukegan agreement, the court will briefly address Case's other proposed bases for summary judgment.

a. Sharman 's Authorization To Sign For Case Brasil

Case sets forth an alternative reason for granting summary judgment on Extra's fraud claim (Count I), which is based upon Sharman's alleged misrepresentation that he had authority to sign the Waukegan agreement on Case Brasil's behalf. According to Case, undisputed evidence establishes that Sharman *did* possess authority to bind Case Brasil, and therefore no fraud occurred. In support, Case relies on evidence that Sharman was vice-president and general manager of Case's Latin American region, and that Case Brasil reported directly to him. Additionally, Case relies upon deposition testimony from

both an in-house attorney for Case as well as the controller of Case Brasil, both of whom believed that Sharman possessed the authority to sign the Waukegan agreement on Case Brasil's behalf.

In response, Extra points to testimony given by Sharman at his deposition which calls into question whether Sharman thought he could sign on Case Brasil's behalf. Specifically, Extra notes that when asked whether he actually had authority to act on behalf of Case Brasil, Sharman responded "I don't know." Sharman also testified that he did not know the corporate structure of Case Brasil, and that he was an officer only of Case (as opposed to Case Brasil).

In the court's view, Case is not entitled to summary judgment on this alternative basis. Extra has identified evidence which calls into question whether Sharman thought, or reasonably thought, that he could bind Case Brasil. Furthermore, whether Sharman had authority to act on behalf of Case Brasil depends on more than just whether Sharman thought he had authority. Factors such as Case's corporate structure and governance are also relevant, as are any resolutions adopted by the boards of directors of Case and Case Brasil defining the authority vested with the corporations' officers. *See Gilbert v. Sycamore Mun. Hosp.*, 622 N.E.2d 788, 794-96 (Ill. 1993) (discussing numerous factors relevant to authority and apparent authority under Illinois law). The parties have scarcely addressed any of the relevant factors, and the facts that were presented are in dispute. However, although Case is not entitled to summary judgment on this basis, as discussed more thoroughly below, it is entitled to summary judgment on Count I for a related reason

—Extra has not offered evidence establishing that Sharman's alleged lack of authority was a proximate cause of its damages.

b. Scheme to Defraud

Case contends that an alternative basis for granting it summary judgment on its promissory fraud claim (Count III) is that Extra has no evidence of a scheme to defraud. In its order denying Case's motion to dismiss the amended complaint, the court held that Extra had sufficiently alleged a scheme to defraud, a necessary element of a claim of promissory fraud. *See Houben v. Telular Corp.*, 231 F.3d 1066, 1074 (7th Cir. 2000) ("As a general rule, promissory fraud is not actionable in Illinois unless the promise is part of a 'scheme' to defraud."). The court identified the scheme as follows: (1) Case allegedly manipulated the corporate distinction between itself and Case Brasil; (2) Sharman misrepresented his authority to sign the agreement on behalf of Case Brasil; (3) Case promised Extra that Case Brasil would retain Extra as a distributor and resolve the improper charge back dispute. Case allegedly engaged in this conduct in order to induce Extra to give it information about the alleged fraud by executives at Case Brasil, and to limit Extra's claims against Case Brasil to $2 million.

Extra has offered evidence to support its allegations of a scheme to defraud. For instance, according to Extra's owner, Persio Briante, as soon as Case got the information it wanted from Extra, it reneged on its various agreements. Specifically, Case failed to stop Case Brasil from terminating the distribution agreement with Extra. Briante also contends that Case allowed Case Brasil to pressure Extra into for-

feiting either the $2 million cap on Case Brasil's liability or risk Case Brasil terminating the distribution agreement (which Case Brasil eventually did). Evidence of a series of broken promises, even if the promises are all related, is sufficient to prove a scheme to defraud. *See AAR Int'l, Inc. v. Vacances Heilaides S.A.*, 202 F. Supp. 2d 788, 789 (N. D. Ill. 2002). Therefore, Case has not established an alternative basis entitling it to summary judgment on Count III.

c. Link Between Alleged Misrepresentations and Damages

Finally, Case argues that it is entitled to summary judgment on Extra's fraud claims in both Counts I and III because Extra cannot establish proximate causation between the alleged misrepresentations and damages. A plaintiff may recover only those damages proximately caused by the alleged wrong. *See Martin v. Heinold Commodities, Inc.*, 643 N.E.2d 734, 748 (Ill. 1994) ("proximate causation limits recovery to those damages which might foreseeably be expected to follow *from the character of the misrepresentation itself')* (internal quotation and citation omitted) (emphasis added).

The court agrees that Extra has not established proximate causation on Count I, which is based upon Sharman's alleged lack of authority to sign on behalf of Case Brasil. The damages Extra has described in its pleadings flowed from Case Brasil's termination of its distribution agreement with Extra. There is no evidence, however, that the reason Case Brasil terminated the agreement was because it thought the Waukegan agreement was invalid and, in fact, nothing in the record suggests that Case Brasil

has ever attempted to have the Waukegan agreement invalidated because Sharman was not authorized to sign it. To the contrary, it is undisputed that Case Brasil at least partially performed under the agreement.

The evidence submitted establishes only that Case Brasil terminated the distribution agreement because it believed that it was permitted to do so under the terms of the Waukegan agreement, not because it thought that the Waukegan agreement was invalid. In other words, the parties' dispute is based upon the terms of the Waukegan agreement, rather than who signed the Waukegan agreement. Therefore, no proximate causation exists between the fraud alleged in Count I (Sharman's authority to bind Case Brasil to the Waukegan agreement) and the damages Extra contends it suffered (due to Case Brasil's termination of the distribution agreement). Case is therefore entitled to summary judgment on Count I on this alternative basis.

Case is not entitled to summary judgment on this alternative basis for Count III, however. The gist of the allegations in Count III is that Case promised that it would cause Case Brasil to fulfill its obligations under the Waukegan agreement as well as the underlying distribution agreement, but never intended to do so and, in fact, did not. Extra's damages are based upon Case Brasil's failure to fulfill its obligations under the distribution agreement. If true, then Case's failure to keep Case Brasil from breaching the distribution agreement proximately caused the damages that resulted from the breach. Case has therefore not established that it is entitled to summary judgment on Count III on this basis.

4. Motion to Strike

Case has also filed a motion to strike Extra's "Counter-Statement of Material Facts in Dispute" and a supporting affidavit. According to Case, the Counter-Statement should be struck because, rather than just admitting or denying the facts set forth in Case's Local Rule 56.1 statement, Extra has introduced its own set of facts. Case is correct that the rules required Extra to set forth its own facts in its own set of separately numbered paragraphs, rather than in response to Case's separately numbered statements of fact. *See* Local Rule 56.1(b)(3)(B), (C). However, Case's argument that Extra's Counter-Statement should be struck need not be addressed because the court has already concluded that Case is entitled to summary judgment on all of Extra's claims.

CONCLUSION

For the reasons stated above, the court grants defendant Case's motion for summary judgment [152-1] in its entirety. The motion to strike [159-1] is stricken as moot. The clerk is directed to enter a Rule 58 judgment to this effect and to terminate this case from the court's docket.

ENTER:

DATE: November 27, 2006

/s/ BLANCHE M. MANNING
Blanche M. Manning
United States District Judge

UNITED STATES DISTRICT COURT
N.D. ILLINOIS, EASTERN DIVISION

No. 01 C 8591
July 1, 2005

EXTRA EQUIPAMENTOS E EXPORTACAO LTDA. and PERSIO D. BRIANTE,

Plaintiffs,

—v.—

CASE CORPORATION,

Defendant.

MEMORANDUM AND ORDER

MANNING, J.

Plaintiffs Extra Equipamentos E Exportacao Ltda. and Persio D. Briante (collectively, "Extra") filed the instant diversity action against Defendant Case Corporation ("Case") alleging fraudulent misrepresentation and promissory fraud in connection with an agreement into which Extra entered with Case Brasil & Cia ("Case Brasil"), Case's Brazilian subsidiary, which is not named as a defendant in this action. The current matter is before the Court on

Case's Motion to Reconsider this Court's Memorandum and Order issued on January 20, 2005 ("the January Order"), which denied Case's motion to dismiss the fraud claims. Case contends that this Court should reconsider dismissing this action on forum non conveniens grounds based on "newly discovered evidence" and a "misapprehension of the law" by this Court. For the reasons set forth below, the Court DENIES this motion.

A motion to reconsider permits a litigant to alter or amend a prior ruling where: (1) the court has "patently misunderstood a party"; or (2) there has been "a controlling or significant change in the law or facts." *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 966 F.2d 1185, 1191 (7th Cir.1990). Because such problems "rarely arise," however, a "motion to reconsider should be equally rare." *Id.* Requests to reconsider a prior ruling should not simply rehash previously raised arguments, *Lewis v. Herman*, 783 F.Supp. 1131, 1132 (N.D.Ill.1991), and do not permit a party the opportunity to undo its own procedural failures or present new evidence or arguments "that could and should have been presented to the district court prior to judgment." *Moro v. Shell Oil Co.*, 91 F.3d 872, 876 (7th Cir.1996). This "court's orders [are not] 'mere first drafts, subject to revision and reconsideration at a litigant's pleasure.' " *Thompson v. Perryman*, No. 98 C 1596, 1998 WL 786221 (N.D.Ill. Nov. 6, 1998). Whether to grant a motion to reconsider "is entrusted to the sound judgment of the district court." *Matter of Prince*, 85 F.3d 314, 324 (7th Cir.1996).

Here, Case contends that this Court should reconsider its denial of Case's forum non conveniens motion on the grounds that: (1) there is "newly dis-

covered evidence" and (2) this Court erred in concluding that Illinois law governs Extra's fraud claims. The Court will address each of these contentions in turn.

First, according to Case, "newly discovered evidence confirms that . . . nearly all of the relevant documents are written in Portuguese and located in Brazil, and an overwhelming number of the witnesses with relevant knowledge are located in Brazil, speak Portuguese, and are not subject to the Court's subpoena power." As a result of this "newly discovered evidence," Case contends that the "private factors" in the forum non conveniens analysis now favor dismissal.[1]

In support of this argument, Case points to discovery it has allegedly received since the January Order. Case asserts that of the 15,257 pages of documents it has received in response to requests to produce, 93% of the pages "are in Portuguese and will need to be translated to English for use in the litigation." The cost of translating these documents will allegedly run upwards of $850,000. Additionally, of the 37 witnesses Extra has identified with knowledge of its claims, "at least 17 . . . are located in Brazil and likely speak only Portuguese, and . . . are not subject to this Court's subpoena power." To depose these Brazilian witnesses, Case contends

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[1] The private factors in a forum non conveniens analysis include the plaintiff's choice of forum; location and access to evidence and witnesses; convenience to the parties and the witnesses; and any other "practical problems that make trial of a case easy, efficient and economical." *Kamel v. Hill-Rom Co.*, 108 F.3d 799, 802-03 (7th Cir.1997). Dismissal, however, is only appropriate if the chosen forum "would result in vexation and oppression to the defendant which would far outweigh the plaintiff's convenience." *Id.*

that it will incur substantial costs because its attorneys will have to travel to Brazil and hire interpreters at $125 per hour.

After reviewing the above alleged "newly discovered evidence," this Court finds that Case has not shown that litigating this case in the present venue "will result in vexation and oppression to the defendant which would far outweigh the plaintiff's convenience." *Kamel*, 108 F.3d at 802-03. Of the 37 potential witnesses identified by Extra, 31 of them were identified prior to Case filing its motion to dismiss, and therefore, this cannot be considered "newly discovered evidence" for purposes of a motion to reconsider. *See Caisse Nationale De Cedit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264, 1269 (7th Cir.1996) (motions for reconsideration "cannot . . . be employed as a vehicle to introduce new evidence that could have been adduced during the pendency of the [prior] motion"). Of the six remaining witnesses, five are Case or Case Brasil employees, and thus, it should not be a problem for Case to ensure the appearance of these witnesses in this district.

As for the costs of translation and interpreting services, these costs affect both parties in that Extra faces the same problems that Case has with translating relevant documents and the testimony of Brazilian witnesses who do not speak English. Moreover, Case's alleged costs seem somewhat overstated. Because Case Brasil is a 100% subsidiary of Case, it would appear reasonable that instead of having all the 15,000 plus produced documents translated word-for-word (particularly when not all may be relevant), that Case have its Brazilian employees, particularly the ones with knowledge of

this suit, assist in reviewing the documents to find the relevant ones. Case would then only need to translate the documents that are relevant. Moreover, considering that Case is a Wisconsin corporation and that many of the witnesses charged in the Complaint no doubt live in that vicinity, this Court does not see how transferring this action to Brazil would be any more convenient to Case than litigating the case here, which is practically in its own back yard. Accordingly, this Court holds that Case has not presented sufficient "newly discovered evidence" for this Court to reverse its ruling on the forum non conveniens issue.

Case also contends that this Court erred in holding that Illinois law (and not Brazilian law) governs Extra's fraud claims. In support of this contention, Case relies on *Medline Industries Inc. v. Maersk Medical Ltd.*, 230 F.Supp. 857, 862 (N.D.Ill.2002), which held that a contractual choice-of-law provision applied to a fraudulent inducement claim that was "dependent upon" the underlying contract. There are a number of problems with this argument. First, Case ignores the numerous cases cited on page 12 of the January Order which held that under the most significant contacts test the law of the state where the fraudulent conduct took place governs a claim for fraudulent inducement.

Moreover, this Court finds that *Medline* is distinguishable from this case. In *Medline*, 230 F.Supp. at 859-60, an Illinois corporation entered into an exclusive licensing agreement with an English company and a Scottish company. After the Illinois company discovered that the foreign companies had licensed the product to a third-party, it brought suit in Illinois for breach of contract, fraudulent inducement, and

tortious interference. *Id.* at 860. On a motion to dismiss, the court held that an English choice-of-law provision in the underlying licensing agreement applied to the fraudulent inducement claim. *Id.* at 863. The court based this holding on its finding that the fraudulent inducement claim was "dependent upon the contract" because "the allegedly fraudulent statements were made in the contract." *Id.*

Here, the Waukegan Agreement (which has a Brazilian choice-of-law clause) does contain alleged false representations that Mr. Sherman (who was the head of Case's Latin American operations) had the authority to bind Case Brasil. Unlike *Medline*, however, Extra's fraud claims are not dependent upon the Waukegan Agreement. As explained in detail in the January Order, Extra's fraud allegations are premised on conduct prior to the signing of the Waukegan Agreement. To get Extra (and its president Mr. Briante) to come to Waukegan to sign the Agreement, Case allegedly assured Extra that Mr. Sharman had the authority to bind Case Brasil to the Agreement. These representations were allegedly repeated by Case on the day the Agreement was signed. Additionally, in contrast to the defendants in *Medline*, who were parties to the underlying contract, Case is not even a party to the Waukegan Agreement. Consequently, although it is a close call, this Court cannot hold that Extra's fraud claims are "dependent upon" the Waukegan Agreement, and therefore, the Agreement's choice-of-law clause does not govern Extra's fraud claims.

In the alternative, Case moves this Court to "order Extra to pay for all translation and interpreter costs." This is a motion which should be taken up with Magistrate Judge Schenkier, who is handling

discovery in this case. At this point in time, it would be absurd for this Court to blindly order Extra to pay Case the cost of translating over 15,000 documents, without knowing if such documents are even relevant to this litigation. Moreover, it appears that, at least during the discovery phase, this Court does not have the authority under the federal rules to even enter such an order. *In re Puerto Rico Elec. Power Auth.*, 687 F.2d 501, 508-09 (1st Cir.1982); *Cook v. Volkswagen of America*, 101 F.R.D. 92 (S.D.W.Va.1984). Accordingly, the Court DENIES this request without prejudice.

CONCLUSION

For the reasons discussed, this Court DENIES Defendant Case Corporation's Motion to Reconsider [83-1].

UNITED STATES DISTRICT COURT
N.D. ILLINOIS, EASTERN DIVISION

No. 01 C 8591
January 20, 2005

EXTRA EQUIPAMENTOS E EXPORTACAO LTDA. AND PERSIO D. BRIANTE,

Plaintiffs,

—v.—

CASE CORPORATION,

Defendant.

CHRISTOPHER TODD SHEEAN, KELLEY, DRYE & WARREN, Chicago, IL, for Plaintiffs.

BRIAN DOUGLAS SIEVE, JAMES C. JOSLIN, JEFFREY RICHARD MILLER, MARIA A. MEGINNES, KIRKLAND & ELLIS LLP, Chicago, IL, for Defendant.

MEMORANDUM AND ORDER

MANNING, J.

Plaintiffs Extra Equipamentos E Exportacao Ltda. and Persio D. Briante (collectively, "Extra") filed the instant diversity action against Defendant Case Corporation ("Case") alleging fraudulent misrepresentation, negligent misrepresentation, and promissory fraud in connection with an agreement Extra entered into with Case Brasil & Cia ("Case Brasil"), Case's Brazilian subsidiary, which is not named as a defendant in this action.

The current matter is before the Court on Case's motion to dismiss Extra's Amended Complaint ("the Complaint"), pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), 12(b)(7), and 19, as well as on the grounds of forum non conveniens.[1] In the alternative, Case seeks to strike certain paragraphs in the Complaint under Rule 12(f). For the reasons that follow, the Court: (1) DENIES the motion to dismiss with respect to the fraud claims but GRANTS it as to the negligent misrepresentation claim; and (2) DENIES the motion to strike.

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[1] This motion comes before this Court on remand from the Seventh Circuit. In a prior opinion (2002 WL 1888540), this Court dismissed this case on the grounds that Extra failed to join an indispensable party (Case Brasil). The Court, however, did not discuss the other grounds on which Case moved to dismiss. On March 15, 2004, the Seventh Circuit, in *Extra v. Case*, 361 F.3d 359 (7th Cir.2004), vacated and remanded this dismissal order. The Court will now address the motion to dismiss consistent with the dictates of the Seventh Circuit and on the other grounds set forth in Case's motion.

BACKGROUND[2]

The Parties

Extra is a Brazilian corporation which sells heavy farm and construction equipment in Brazil. At the time of the allegations in the Complaint, Extra was the leading distributor of Case products in Brazil. Briante, a citizen of Brazil, is the chief officer of Extra. Case, a Delaware corporation headquartered in Wisconsin, manufactures agricultural and construction machinery. Case Brasil is a Brazilian subsidiary of Case, whose principal business is the sale of Case equipment in Brazil.[3]

Extra's Distributorship in Brasil

Since 1992, Extra has sold Case construction and farm equipment pursuant to distribution agreements between Extra and Case Brasil. Extra contends that although it was the largest distributor of Case equipment in Latin America, senior executives at Case Brasil were improperly debiting Extra's account with Case Brasil to inflate Case Brasil's revenues and line their own pockets. According to Extra, Case Brasil was approving high risk loans for farm equipment on behalf of Extra. When the customers defaulted, Case Brasil then debited the bad loans against Extra's account with Case Brasil, thereby

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[2] The facts in the background section are drawn from the Complaint. Although this Court discussed the facts in its prior opinion, it will again set forth the relevant facts as they relate to the issues presently before the Court.

[3] Case Brasil is a "100% subsidiary" of Case. *Extra v. Case*, 361 F.3d 359, 364 (7th Cir.2004).

cheating Extra out of revenue which it had rightfully earned and forcing Extra to absorb the losses for loans which it had no part in procuring.

As a result of these improper charge backs, in July of 1999, Extra brought suit against Case Brasil in Brazil ("the Brazilian Action"), seeking: (a) payment of all commissions owed to Extra; (b) reversal of the illegitimate debits transferred to Extra's current account; and (c) payment for repairs and parts provided by Extra to Case Brasil's "commission" customers.

Around the time of the Brazilian Action, Case began investigating suspected improper activities of executives at Case Brazil and was involved in negotiations for a merger with another company. The executives, who were being investigated, were the same individuals who allegedly forced Extra to accept the improper charge backs. According to Extra, Case knew that the top managers at Case Brasil were acting in an improper and fraudulent manner but could not find proof to sustain their suspicious. Extra also contends that Case was concerned that if the suspected improper activities at Case Brasil became public, its anticipated merger would be put at risk. Case was also troubled that Extra had filed objections to its pending merger with the Brazilian government.

The Waukegan Agreement

In October of 1999, Case's in-house counsel and counsel for Extra began negotiations to resolve the Brazilian Action and to assist Case with its merger and its internal investigation of Case Brasil. Shortly after an initial meeting in Brazil, Extra and Case agreed that Mr. Briante (Extra's president) and the

head of Case's Latin American operations (Mr. James Sharman) would meet in Waukegan, Illinois, on October 19, 1999, to sign an agreement resolving the above issues (the "Agreement" or "Waukegan Agreement").

Under the terms of the Waukegan Agreement, which was drafted the night before by Case's in-house counsel without consulting anyone at Case Brasil, Case Brasil agreed to: (1) continue Extra's distributorship on terms at least as favorable as those offered other distributors; (2) resolve the alleged improper charge backs by capping Extra's liability at a set amount; and (3) present Extra with a "controlling Portugese version" of the Agreement. In exchange for these concessions, Extra agreed to: (1) supply Case with information it needed to prove the wrong-doing by management at Case Brasil; and (2) not interfere with Case's anticipated merger.

Although not officers at Case Brasil, Mr. Sharman, who executed the Agreement on behalf of Case Brasil, and Case's in-house counsel allegedly assured Extra that Mr. Sharman had the authority to bind Case Brasil and that Case Brasil would abide by the terms of the Agreement. Indeed, the Agreement states that it was "entered into by and between Case Brasil & Cia and Equipamentos Exportacao Ltda" and defines the term "Case" to include "Case Brasil & Cia, Case Corporation, and their past, present, and future: subsidiaries, divisions, parent corporation, predecessors . . . ." Also set forth in the Agreement was a clause which stated: "*Representation and Warranty As to Authority.* Each [p]erson signing this document represents and warrants that he or she has full authority to enter into [this Agreement]."

Based on Case's representations and the terms of the Agreement, Extra immediately supplied Case with information detailing the wrongful conduct of the Case Brasil officers. With this evidence, Case was able to "fire" the wrong-doers at Case Brasil and take back control of its subsidiary. Also, with its internal problems resolved and without any objection from Extra, Case was able to successfully complete its merger.

Despite having fully complied with its obligations under the Agreement, Extra alleges that Case Brasil, although a 100% subsidiary of Case, has completely ignored its obligations under the Agreement. Case Brasil contends that the Waukegan Agreement is not binding because Mr. Sharman was not a Case Brasil officer nor was he authorized to bind Case Brasil. Case, despite representations to the contrary, has done nothing to ensure that Case Brasil follow the terms of the Agreement. In fact, Case Brasil has sought to terminate Extra's distributorship. Adding insult to injury, Case now allegedly contends that the Agreement was negotiated between Extra and Case Brasil, and therefore, this dispute is solely between them.

As a result of the above actions, in November of 2001, Extra filed its initial complaint against Case, alleging breach of contract and fraud. Extra alleged that Case breached the Agreement by its failure to have Case Brasil abide by its obligations thereunder, such as fixing the improper charge backs and retaining Extra as a distributor.

In response to the original complaint, Case filed its initial motion to dismiss for failure to join an indispensable party (Case Brasil) and on grounds of forum non conveniens. After interpreting the lan-

guage of the Agreement, this Court held in an August 13, 2002 Memorandum and Order ("August Order") that Case Brasil was a party to the Agreement and therefore was a necessary and indispensable party under Rule 19. This determination was based in part on the language of the Agreement, which defines "Case" to include Case Brasil; states the signing parties are identified in the contract as "EXTRA EQUIPAMENTOS EXPORTACAO LTD." and "CASE BRASIL & CIA"; and contains the subheading "[t]his Release . . . is entered into by and between Case Brasil & Cia and Extra Equipamentos Exportacao Ltda."Accordingly, the Court granted the motion to dismiss the initial complaint.

The Court, however, withdrew its August Order, on November 22, 2002, because Extra did not respond to the initial motion to dismiss before the Court issued its dismissal order. Case filed its initial motion to dismiss on January 7, 2002. Instead of appearing before this Court to seek an extension of the briefing schedule on the initial motion to dismiss, however, Extra simply sought leave from the magistrate judge to take limited jurisdictional discovery without notifying this Court. Consequently, because Extra did not respond to the initial motion to dismiss, this Court ruled on the motion. When withdrawing the August Order dismissing this action, this Court set a briefing schedule and granted Extra leave to amend its complaint.

In an attempt to plead around this Court's August Order finding that Case Brasil was a party to the Agreement and therefore an indispensable party, Extra does not allege breach of contract in its Amended Complaint. Instead, Extra has pled only tort claims solely against Case. The Amended Com-

plaint alleges fraudulent misrepresentation (Count I), negligent misrepresentation (Count II), and promissory fraud (Count III). Extra contends that Case "perpetrated a fraudulent scheme" and "made utterly reckless misrepresentations" to Extra to induce Extra to enter into the Agreement. Case allegedly "manipulated the corporate distinction between itself and Case Brasil" and misrepresented that Mr. Sharman had authority to sign the agreement on behalf of Case Brasil, when he in fact did not. Extra alleges that Case knew that Case Brasil, who was to take action under the Agreement, would not follow or comply with the terms of the Agreement and that Mr. Sharman did not have the authority to bind Case Brasil.

In response to the Amended Complaint, Case filed the instant motion to dismiss.

ANALYSIS

Case contends that dismissal is proper on the grounds that: (I) Extra failed to join an indispensable party (Case Brasil); (II) Brazil is the proper location for this action (forum non conveniens); and (III) the Complaint does not sufficiently allege a cause of action. In the event that dismissal is not granted, Case seeks to strike portions of the Complaint. The Court will address each of these contentions in turn.

I. Failure to Join an Indispensable Party[4]

In an opinion dated June 6, 2003 (2002 WL 1888540), this Court found that Case Brasil was a necessary and indispensable party under Rule 19, and therefore, dismissed this action for failure to join an indispensable party. On appeal, the Seventh Circuit vacated and remanded this dismissal "consistent with the guidance provided by this opinion." In so holding, the court held that in analyzing "indispensability," the district court should have taken into account the fact that Case Brasil was a "100 percent subsidiary" of Case. According to the Seventh Circuit, it is extremely unlikely that Case Brasil would be prejudiced if not a party to this action because Case would fully protect Case Brasil's interests as it is its wholly owned subsidiary.[5] Therefore, the court noted that one of the Rule 19(b) factors

[4] In ruling on a motion to dismiss for failure to join an indispensable party, the court must accept the allegations of the complaint as true. *Davis Companies v. Emerald Casino, Inc.*, 268 F.3d 477, 479 (7th Cir.2001); *Pasco Int'l (London) Ltd. v. Stenograph Corp.*, 637 F.2d 496, 499 (7th Cir.1980). The court may, however, look outside of the pleadings and consider extrinsic evidence. Davis, 268 F.3d at 480; *English v. Cowell*, 10 F.3d 434, 437 (7th Cir.1993); *Capitol Leasing Co. v. Fed. Dep. Ins. Corp.*, 999 F.2d 188, 191 (7th Cir.1993).

[5] Rule 19(b) provides four factors to be considered in determining whether a party is "indispensable." These factors are: "(1) the extent to which a judgment entered in the absence of a party will be prejudicial to those currently before the court; (2) the extent to which such prejudice can be lessened or avoided by reshaping the judgment; (3) whether a judgment entered in a party's absence will be adequate; and (4) whether the plaintiff will have an adequate remedy if the action is dismissed." *Moore v. Ashland Oil, Inc.*, 901 F.2d 1445, 1447 (7th Cir.1990).

(prejudice to the absent party) could likely not be met. In reaching this conclusion, the court stated that "we have great difficulty seeing how a 100 percent subsidiary could *ever* be an indispensable party." (Emphasis in original.)

Following the above instructions, this Court has not found, nor has Case cited, any authority or facts supporting the conclusion that Case Brasil (as a 100 percent owned subsidiary) would or could be overtly prejudiced by not being a party to this action. Accordingly, this Court, in the exercise of its discretion, now finds a judgment in this case would not prejudice Case Brasil to such an extent as to render it an indispensable party.

II. Forum Non Conveniens[6]

The Court next turns to whether this action should be dismissed under the forum non conveniens doctrine. Under this doctrine, a court may dismiss an action "over which it would normally have jurisdiction if it best serves the convenience of the parties and the ends of justice." *Kamel v. Hill-Rom Co.*, 108 F.3d 799, 802 (7th Cir.1997). Dismissal, however, is only appropriate if the chosen forum "would result in vexation and oppression to the defendant which would far outweigh the plaintiff's convenience." *Id.*

In ruling on a forum non conveniens motion, courts must: (1) assess whether there is an adequate alternative forum; and (2) balance the private and

[6] As in the motion to dismiss for failure to join indispensable parties, in ruling on a forum non conveniens motion the Court may look at facts outside the four corners of the complaint. *See Hidrovia v. Great Lakes Dredge & Dock Corp.*, 2003 WL 2004411, at *3 (N.D.Ill. April 28, 2003).

public interests factors.[7] *Id.* at 802-03. Private factors include: the plaintiff's choice of forum;[8] location and access to evidence and witnesses; convenience to the parties and the witnesses; and any other "practical problems that make trial of a case easy, efficient and economical." *Id.* at 803. The public interest factors consist of:

> the administrative difficulties stemming from court congestion; the local interest in having localized disputes decided at home; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflicts of law or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Id.

The defendant bears the burden of persuasion of the private and public factors. *Gupta v. Austrian Airlines*, 211 F.Supp.2d 1078, 1087 (N.D.Ill.2002). To meet this burden, the movant must "provide enough information to enable the court to balance the par-

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[7] An adequate alternative forum exists if "all parties are amenable to process" and "the parties will not be deprived of all remedies or treated unfairly." *Kamel*, 108 F.3d at 802. Here, the parties do not contest that Brazil is an adequate alternative forum. Moreover, in the appeal of the Rule 19 motion, the Seventh Circuit held that "Case is suable [in Brasil]" because "it moved to have the case transferred [there], and we take this to be binding consent to be sued there." *Extra v. Case*, 361 F.3d 359, 361 (7th Cir.2004).

[8] Although the plaintiff's choice of forum is usually given great deference, where the plaintiff is foreign corporation, its choice is accorded little deference. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 266, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981).

ties' interests." *Id.* Exactly how much information must be provided is left to the discretion of the district court and should be decided on a case by case basis. *See, e.g., Hidrovia.*, 2003 WL 2004411, at *3. Generally, the defendant does not need to provide detailed affidavits "identifying the witnesses [it] would call and the testimony these witnesses would provide if the trial were held in an alternative forum." *Piper*, 454 U.S. at 258. The defendant, however, must at least identify the specific witnesses who will not be able to testify in the chosen forum and the documents vital to the action which are located in the alternative forum. *See Gupta*, 211 F.Supp.2d at 1087; *Hidrovia.*, 2003 WL 2004411, at *3. The defendant must present sufficient information for the court to "have a basis upon which to scrutinize the substance of the dispute between the parties to evaluate what proof is required, and determine whether the pieces of evidence cited by the parties are crucial, or even relevant, to the plaintiff's cause of action and to any potential defenses to the action." *In re Bridgestone, Inc.*, 305 F.Supp.2d 927, 933 (S.D.Ind.2004). In other words, the court must look at the access to proof factor in context of the "gravamen" of the claim and "where the dispute is centered." *See Hidrovia.*, 2003 WL 2004411, at *3. Where the defendant "fail[s] to identify any necessary document, witness, or third-party defendant located in [the foreign country], which would be unavailable for trial" in the chosen forum, courts generally find that the private interest factor does not favor dismissal. *See In re Bridgestone, Inc.*, 305 F.Supp.2d at 933.

Here, after carefully examining the parties' submissions and the Complaint, this Court, in exercise

of its discretion, finds that neither the private nor public factors support dismissal of this case under the forum non conveniens doctrine. The two factors pertinent to this Court's decision (which are the two factors Case raises in its motion) are whether the key witnesses and documents needed to resolve this action are located in Brazil and whether this Court will have to apply Brazilian law.

Case has not set forth any specific names of witnesses or documents pertinent to the germane issues in this case that are located in Brazil. Instead, Case states generally that the "relevant documents" and Case Brasil employees with knowledge of Case Brasil's non-compliance with the terms of the Waukegan Agreement are located in Brazil. Thus, according to Case, the access to witnesses and documents factor favors dismissal.

Case's contention is misguided. It is undoubtedly true that some documents and witnesses supporting Case Brasil's failure to perform under the Agreement are located in Brasil. Extra, however, does not seek redress for Case Brasil's breach of the Waukegan Agreement. Instead, Extra has pled tort claims—negligent and fraudulent misrepresentation and promissory fraud—solely against Case. Extra contends that Case "perpetrated a fraudulent scheme" and "made utterly reckless misrepresentations" to induce Extra to enter into the Agreement. Specifically, Case allegedly "manipulated the corporate distinction between itself and Case Brasil" and misrepresented Mr. Sharman's authority to sign the agreement on behalf of Case Brasil. These misrepresentations were made by Case employees from their headquarters in Racine, Wisconsin and/or in Waukegan, Illinois. While testimony of Case Brasil

employees and documents located in Brazil could be relevant in this case, such evidence would only shed light on tangential issues—*e.g.*, whether and why Case Brasil refused to honor the Waukegan Agreement. This evidence, however, is not necessary for this Court to determine if case made misstatements or used fraud to induce Extra to enter into the Waukegan Agreement.

Likewise, Case's contention that Brazilian law governs this action is incorrect. Federal courts sitting in diversity apply the choice of law doctrine of the state in which the court sits (in this case Illinois). *ECHO, Inc. v. Whitson, Co.*, 52 F.3d 702, 706 (7th Cir.1995). In tort cases, Illinois uses the "most significant relationship" test adopted from the Restatement (Second) of the Conflict of Laws.[9] *Reid v. Norfolk & Western Ry. Co.*, 157 F.3d 1106, 1110 (7th Cir.1998). In applying the most significant relationship test, courts consider: (1) the place of the injury; (2) the location of the tortious conduct; (3) the domicile of the parties; and (4) the center of the parties' relationship. *Fredrick v. Simmons Airlines, Inc.*, 144 F.3d 500, 503-04 (7th Cir.1998).

The above factors are not applied equally or consistently in all tort actions. For example, in *First National Bank of Boston v. Heuer*, 702 F.Supp. 173,

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[9] The choice of law clause in the Waukegan Agreement (requiring the Agreement be interpreted under Brazilian law) is not dispositive because Extra alleges claims for tort not breach of contract. *See First Nat'l Bank of Boston v. Heuer*, 702 F.Supp. 173, 175-76 (N.D.Ill.1988) (applying the most significant relationship test in a tort action for fraudulent misrepresentation in the context of a contract, the court disregarded the contract's choice of law provision because the "action [was] in tort, not contract").

174 (N.D.Ill.1988), the plaintiff, a Massachusetts company, brought an action for fraudulent misrepresentation against a company located in Illinois. The plaintiff alleged that the defendant made misrepresentations in securing a line of credit. *Id.* Applying the most significant relationship test, the court held that "in cases of fraud and or misrepresentation, unlike personal injury actions, the place of loss is less important than the place the defendant allegedly made the misrepresentations." *Id.* at 175-76. The court thus found that Illinois law applied "because the alleged misrepresentations were made in Illinois" by an Illinois resident. *Id.* at 176. *See also Snyder v. Fahim*, 1987 WL 14022, at *3 n. 1 (N.D.Ill. July 16, 1987) (applying the most significant contacts test in a fraudulent misrepresentation case, the court held that Missouri law applied because the defendant's "fraudulent conduct took place in Missouri"); *Gates Rubber Co. v. USM Corp.*, 351 F.Supp. 329, 338-39 (N.D.Ill.1972) (applying New York law because the fraudulent misrepresentations were made there), *rev'd on other grounds*, 508 F.2d 603 (7th Cir.1975).

Here, while Extra's injuries and its relationship with Case Brasil are centered in Brazil, the misrepresentations which are at the heart of the tort claims in the Complaint were made by Case to Extra in Illinois. Case allegedly induced Extra to come to Illinois and sign the Waukegan Agreement based on its false representations that it "had full authority to bind Case Brasil." The Agreement itself, which was drafted by Case's in-house counsel in Illinois or Wisconsin, stated that it was between Case Brasil and Extra and warranted that the signer for Case (Mr. Sharman) had authority to bind Case Brasil. Accord-

ing to Extra, these statements were all false because Case knew at the time of making these statements that Mr. Sharman had no such authority and that Case Brasil would not abide by the terms of the Agreement. This Court thus finds that Illinois law applies because all (or at least the majority) of the alleged misrepresentations were made in Illinois.

Accordingly, this Court denies the motion to dismiss on forum non conveniens grounds. Also relevant to this Court's decision is the fact that Extra has "chosen a forum which is [in Case's] own back yard," and thus Case can hardly complain about this venue being inconvenient. *See Gassner v. Stotler and Co.*, 671 F.Supp. 1187, 1190-91 (N.D.Ill.1987) (denying forum non conveniens motion where plaintiffs, who were German citizens, sued an Illinois partnership in federal court in Chicago for fraudulent activity perpetrated by the defendant in Illinois).

III. 12(b)(6) Motion to Dismiss[10]

Case also moves to dismiss this action under Rule 12(b)(6) on the grounds that Extra has failed to

[10] In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the court must assume the truth of all facts alleged in the pleadings, construing allegations liberally and viewing them in the light most favorable to the non-moving party. *See, e.g., McMath v. City of Gary*, 976 F.2d 1026, 1031 (7th Cir.1992); *Gillman v. Burlington N. R.R. Co.*, 878 F.2d 1020, 1022 (7th Cir.1989). Dismissal is properly granted only if it is clear that no set of facts which the plaintiff could prove consistent with the pleadings would entitle the plaintiff to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Kunik v. Racine County, Wis.*, 946 F.2d 1574, 1579 (7th Cir.1991) (*citing Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984)). The court will accept all well-pled factual allegations in the complaint as true. *Miree v. DeKalb County*,

plead a claim for misrepresentation (both fraudulent and negligent) or promissory fraud and that Extra has failed to plead fraud with sufficient particularity as required by Rule 9(b).[11]

A. Misrepresentation Claims

To plead a claim for fraudulent misrepresentation under Illinois law, a plaintiff must allege: (1) the defendant made a false statement of material fact; (2) the defendant knew the statement to be false; (3) the defendant intended to induce the plaintiff to act with the false statement; (4) the plaintiff relied upon the truth of the false statement; and (5) the plaintiff suffered damages as a result of relying on the false statement. *W.W. Vincent & Co. v. First Colony Life Ins. Co.*, 351 Ill.App.3d 752, 286 Ill.Dec. 734, 814 N.E.2d 960, 969 (Ill.App.Ct.2004). A claim for negli-

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433 U.S. 25, 27 n. 2, 97 S.Ct. 2490, 53 L.Ed.2d 557 (1977). In addition, the court will construe the complaint liberally and will view the allegations in the light most favorable to the non-moving party. *Craigs, Inc. v. General Electric Capital Corp.*, 12 F.3d 686, 688 (7th Cir.1993). However, the court is neither bound by the plaintiff's legal characterization of the facts, nor required to ignore facts set forth in the complaint that undermine the plaintiff's claims. *Scott v. O'Grady*, 975 F.2d 366, 368 (7th Cir.1992).

Here, the parties have cited to affidavits and other documents attached to their submissions. While this Court considered this evidence in ruling on the above motions, it will not consider it when deciding the Rule 12(b)(6) motion. Moreover, at this point in time, particularly given the fact that only limited jurisdiction discovery had been taken at the time this motion was filed, the Court will not convert the motion into a motion for summary judgment.

[11] As explained above, this Court will apply Illinois substantive law to Extra's claims.

gent misrepresentation requires the same, except that: (1) instead of alleging that the defendant knew the statement was false, the plaintiff need only allege that the defendant was careless or negligent in ascertaining the veracity of the statement; and (2) the plaintiff must also allege that the party making the statement was "under a duty to communicate accurate information." *Fox Assocs., Inc. v. Robert Half Int'l, Inc.*, 334 Ill.App.3d 90, 267 Ill.Dec. 800, 777 N.E.2d 603, 606 (Ill.App.Ct.2002).

Here, Case contends that Extra has failed to plead an actionable claim for misrepresentation because: (1) Case Brasil ratified the Agreement, and thus, no false statement was made; and (2) Extra has not sufficiently alleged that it relied on a misrepresentation or that a misrepresentation caused it to suffer damages. Case also contends that the negligent misrepresentation claim fails because Extra has not alleged that the Case employees, who allegedly made the false statement, were under a duty to communicate accurate information. The Court will address these three contentions in turn.

First, Case contends that Extra has failed to allege the existence of a false statement because even if it signed the Waukegan Agreement without the authority to bind Case Brasil, Case Brasil ratified the Agreement two weeks afterwards when it signed a power of attorney ("the Power of Attorney") appointing Mr. Sharman its "attorney-in-fact." There are a number of problems with this contention. For one, the Power of Attorney is not mentioned nor attached to the Complaint, and therefore, in ruling on a Rule 12(b)(6) motion, this Court should not even take it into consideration. Moreover, even if this Court were to convert this motion

into a motion for summary judgment, the parties have submitted conflicting affidavits as to whether the Power of Attorney is even valid under Brazilian law. Thus, at this time, dismissal on the grounds that Case Brasil ratified the Waukegan Agreement by executing the Power of Attorney is not appropriate.[12]

Second, this Court finds that Extra has sufficiently alleged causation and reliance.[13] As set forth in more detail above, Extra alleges that Case "perpetrated a fraudulent scheme" to induce Extra to enter the Waukegan Agreement. As part of this scheme, Case "manipulated the corporate distinction between itself and Case Brasil" and misrepresented that Mr. Sharman had authority to sign the agreement on behalf of Case Brasil. "In reliance on [these and other] representations" Extra executed the Agreement and provided Case information regarding the wrong-doing by Case Brasil officers while keeping this information quiet so as not to upset Case's proposed merger. Extra further alleges that its reliance was "reasonable . . . as Mr. Sharman was a senior Case executive" who headed its Latin American

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[12] The Court also notes that even if Case had authority to bind Case Brasil pursuant to the Power of Attorney, dismissal would not be proper because Extra alleges other misrepresentations, such as that Case knew that Case Brasil would not abide by the terms of the Agreement but nevertheless induced Extra to execute the Agreement.

[13] The elements of causation and reliance for negligent misrepresentation are the same as for other torts—the plaintiff must allege it reasonably relied on the false statement and "but for" the false statement the plaintiff would not have incurred the harm alleged in the complaint. *See Continental Assurance Co. v. Dean Witter Reynolds, Inc.*, 1993 WL 101448, at *2 (N.D.Ill. April 5, 1993).

operations, which included Case Brasil. As a result of its reliance, Extra alleges that it suffered damages including losing its Case distributorship and not resolving the illegal charge back dispute. Accordingly, this Court finds that Extra has sufficiently alleged reliance and causation.

Third, Case also contends that Extra has failed to plead negligent misrepresentation because it has not sufficiently alleged that Case had a duty to supply accurate information to Extra. Extra does allege that "Case had a duty to communicate accurate information to Extra and Mr. Briante with respect to Case's authority to enter into the Waukegan Agreement." (Am. Complt. at ¶ 94.) While federal notice pleading it very lenient, this is a legal conclusion. Thus, the Court finds that this broad allegation is insufficient to plead a duty for a claim of negligent misrepresentation.

Realizing this defect, Extra contends that it has properly pled the existence of a duty by alleging that Case's senior in-house corporate counsel (Mr. Brian Cahill) had a duty to provide accurate information to Extra with regard to Case's authority to bind Case Brasil to the Agreement. The Court will thus examine when an attorney has a duty to provide accurate information to a third-party non-client.

Illinois law generally does not impose a duty to provide accurate information unless the defendant is in the "business of providing information for the guidance of others in business dealings." *Guar. Residential Lending Inc. v. Int'l Mortgage Center, Inc.*, 305 F.Supp.2d 846, 863 (N.D.Ill.2004). This exception is usually applied to "pure information" providers such as banks providing credit information to a potential lender, real estate agents, title companies,

and stock brokers. *Fox Assocs., Inc.*, 267 Ill.Dec. 800, 777 N.E.2d at 607-08. In determining if such a duty exists, courts generally must make a "precise, case-specific inquiry." *Guar, Residential Lending Inc. v. Int'l Mortgage Center, Inc.*, 305 F.Supp.2d at 863. While "supplying information need not encompass" the parties' "entire" business dealings, it must have been "central to business transaction between the parties." *Fox Assocs., Inc.*, 267 Ill.Dec. 800, 777 N.E.2d at 607. The court thus must carefully examine "the nature of the information at issue and its relation to the kind of business being conducted" and what was the "ultimate" goal of the parties' business transaction. *Id.* at 608-09.

For a non-client to make a claim of negligent misrepresentation against an attorney, the non-client must allege more than the fact that the attorney supplied information to it to facilitate a transaction between the client and the non-client. *See Astor Chauffeured Limousine Co. v. Runnfeld Investment Co.*, 1988 WL 101267, at *5-6 (N.D.Ill. Sept.1988) (rejecting a broad proposition that attorneys are in the business of supplying information and thus have a general duty to provide accurate information to non-clients). Instead, the court must closely examine the transaction between the client and the non-client and what role the attorney played in the deal. *Id.* For an attorney to have a duty to provide accurate information to a non-client, the non-client must allege that "the primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party." *Greycas v. Proud*, 826 F.2d 1560, 1563-64 (7th Cir.1987). *See also Wafra Leasing Co. v. Prime Capital Corp.*, 192

F.Supp.2d 852, 874 (N.D.Ill.2002); *Astor Chauffeured Limousine Co.*, 1988 WL 101267, at *5-6.

In cases where a duty was found to lie, the client retained the attorney for the limited purpose of supplying the non-client information to facilitate a particular business transaction. For example, in *Greycas*, 826 F.2d at 1562, the attorney was retained to assist in the completion of a loan. Pursuant to the loan agreement, the prospective borrower retained the attorney for the sole purpose of conducting a search for existing liens on the collateral. *Id.* The attorney, despite not conducting a lien search, sent a letter to the lender/non-client stating that there were no liens on the collateral. *Id.* After it turned out that there were existing liens, the non-client sued the attorney for negligent misrepresentation. *Id.* Affirming judgment against the attorney, the Seventh Circuit held that the attorney had a duty to supply the non-client with accurate information because the client retained the attorney for the sole purpose of supplying information to the non-client to facilitate the transaction between his client and the non-client. *Id.* at 1563-65.

Similarly, in *Wafra Leasing Co.*, 192 F.Supp.2d at 858, 874, a non-client sued an attorney who prepared an opinion letter valuing assets which the non-client later purchased. In denying the attorney's motion to dismiss, the court noted that the non-client sufficiently pled negligent misrepresentation by alleging that the client retained and directed the attorney to draft the opinion letter, which was intended to benefit the non-client in the transaction with the non-client. *Id.*

In contrast to *Greycas* and *Wafra*, the court in *Astor Chauffeured Limousine Co.*, 1988 WL 101267,

at *5-6, held that an attorney did not have a duty to supply accurate information to a non-client. The plaintiffs in *Astor* entered into an agreement to sell a business which was owned in part by the defendant attorney. *Id.* at *1-2. The plaintiffs alleged that the attorney "made several material misrepresentations and failed to disclose several material facts in [the] written agreement and during the course of their prior negotiations." *Id.* at *2. In granting summary judgment on the negligent misrepresentation claim against the attorney, the court held that he did not owe a duty to the non-client plaintiffs because his representation was not "intended to confer directly a benefit upon plaintiffs." *Id.* at *5. This decision was based in large part on the plaintiffs allegation that "the purpose" of the attorney's "representation was to induce [the] plaintiffs to purchase ... two companies that would soon be financial failures." *Id.*

Here, unlike *Greycas* and *Wafra*, Extra has not alleged that Mr. Cahill was retained to supply information to Extra for the purpose of facilitating the execution of the Waukegan Agreement. Instead, like the plaintiff in *Astor*, Extra alleges that the purpose of Mr. Cahill's representation was to draft the Agreement and to induce Extra to enter into the Agreement, which only provided illusory benefits to Extra. Moreover, as in-house counsel for Case, this Court fails to see how Extra could allege that Mr. Cahill was retained by Case solely to provide information to Extra. This Court has not found, nor has Extra cited, any authorities holding that an in-house counsel has a duty to supply accurate information to entities other than to its employer/client.

A close look at the facts alleged in the Complaint reveal that Mr. Cahill acted in a manner consistent with representing his client (Case), not that he was retained to supply information to Extra. Mr. Cahill first met with Extra on October 13, 1999, in Brazil to discuss why Extra had filed objections to Case's proposed merger and to attempt to get more information regarding the improper conduct by officers at Case Brasil. Extra informed Mr. Cahill that its "objections were filed to get Case's attention" so it could discuss the improper charge backs by Case Brasil. (Am. Complt. at ¶¶ 39-40, 48-50.) Shortly after returning to the United States, at the request of Extra, Mr. Cahill arranged a meeting in Waukegan, Illinois between himself, Mr. Sharman, Mr. Briante, and Extra's Brazilian attorney. To keep their meeting a secret—so as not to alert the Case Brasil officers suspected of the wrongdoing—Mr. Cahill arranged for the parties to meet in a conference room at an airport in Waukegan, Illinois. Extra alleges that the secrecy of the meeting was essential because Mr. Briante was afraid that the Case Brasil officers might have him killed if they learned that he was informing the home office of their wrongful conduct. The night before the meeting, Mr. Cahill prepared a draft of the Agreement without consulting Case Brasil. (*Id.* ¶¶ 50-53.)

At the start of the meeting, which took place in Illinois on October 19, 1999, either Mr. Cahill or Mr. Sharman immediately asked Mr. Briante to detail the improper conduct of the Case Brasil officers. In response, Mr. Briante stated that he would not divulge any information until Extra's concerns—the improper charge backs and continuation of its distributorship—were resolved. Later that day, after

Mr. Cahill made the alleged misrepresentations, Extra executed the Agreement and then gave Case the desired information.

This Court thus holds that Extra has not alleged sufficient facts to plead that Mr. Cahill had a duty to supply it with accurate information and thus cannot plead negligent misrepresentation. To hold otherwise would result in all in-house attorneys being liable for negligent misrepresentation for making any incomplete or inaccurate statements when negotiating a contract on behalf of their employers. Such a result would contravene the long-standing policy under Illinois law to narrowly construe the "tort of negligent misrepresentation" to "preserve the sphere appropriately governed by contract law from intrusion by tort." *See Continental Assurance Co. v. Dean Witter Reynolds, Inc.*, 1993 WL 101448, at *13 (N.D.Ill. April 5, 1993). Accordingly, this Court grants the motion to dismiss as to the negligent misrepresentation claim.

B. Promissory Fraud

To state a claim for promissory fraud under Illinois law, a plaintiff must allege that the defendant made a false promise or representation of future performance, "not intending to keep the promise but intending for another party to rely on it, and where the other party" in fact relied on the false promise to its detriment. *Bower v. Jones*, 978 F.2d 1004, 1011 (7th Cir.1992). "To survive the pleading stage," the plaintiff must also allege "specific, objective manifestations of fraudulent intent—a scheme or device" used to "accomplish the fraud." *Id.* at 1011-12. In determining if a plaintiff has sufficiently pled intent, courts examine whether the defendant had a motive

and what benefits were bestowed on the defendant by not following through on its alleged promise. *See id.* When analyzing whether there was a scheme to defraud, courts look at whether the alleged "broken promise is embedded in a larger pattern of deceptions or enticements that reasonably induces reliance against which the law ought to provide a remedy." *AAR Int'l, Inc. v. Vacances Heliades S.A.*, 202 F.Supp.2d 788, 799 (N.D.Ill.2002) (finding a scheme to defraud adequately alleged where "defendants alleged a number of related broken promises").

Here, after carefully examining the Complaint, this Court finds that Extra has sufficiently pled fraudulent intent and the existence of a scheme to defraud. Extra alleges that in October of 1999, Case was facing a pending crisis as a result of illegal conduct by certain Case Brasil officers. Case was allegedly fearful that this illegal conduct would hurt Case's Latin American sales, result in litigation in Brazil, and derail on-going negotiations which Case was undertaking to merge with another company. Although Case had investigated the improprieties at Case Brasil, it was unable to procure sufficient evidence to adequately handle the situation. To resolve this problem, Case looked to Extra, which had the evidence that Case needed to fire the Case Brasil officers engaged in the illegal conduct.

According to Extra, Case (by Sharman and Cahill) "perpetrated a fraudulent scheme" and "made utterly reckless misrepresentations" to Extra to induce Extra to come to Illinois to enter into the Waukegan Agreement, knowing that Case Brasil, who was to take action under the Agreement, would not follow or comply with the terms of the Agreement. As part

of this scheme, Case allegedly: (1) "manipulated the corporate distinction between itself and Case Brasil" and (2) misrepresented Mr. Sharman's authority to sign the agreement on behalf of Case Brasil. Case also promised Extra that Case Brasil would, among other things, retain Extra as a distributor and resolve the improper charge back dispute. In return, Extra agreed to: (1) provide Case with information regarding fraudulent activities of executives at Case Brazil; (2) not contest the propose merger between Case and a third-party; and (3) limit its claims against Case Brasil regarding illegal charge backs.

Immediately after signing the Agreement, Extra provided Case with detailed proof of the improper conduct of the Case Brasil officials. Armed with this information, Case then fired these employees. With the problems at Case Brasil resolved and with Extra not objecting, Case was then able to complete its merger. Despite having fulfilled its obligations under the Agreement, Extra alleges that Case Brasil has completely disavowed any duty to perform. According to Extra, contrary to statements made prior to the signing and in the Agreement, Mr. Sharman was not an officer of Case Brasil and had no authority to bind Case Brasil to the Agreement. After receiving the benefits under the Agreement, Case now allegedly asserts that this dispute is between Extra and Case Brasil.

Accordingly, this Court finds that Extra has sufficiently alleged fraudulent intent and a scheme to defraud and thus DENIES Case's 12(b)(6) motion to dismiss Extra's promissory fraud claim.

C. Rule 9(b) Pleading Requirements

Rule 9(b) provides that "the circumstances constituting fraud . . . shall be stated with particularity."Fed.R.Civ.P. 9(b). Circumstances constituting fraud "include the identity of the person who made the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff." *General Elec. Capital v. Lease Resolution*, 128 F.3d 1074, 1078 (7th Cir.1997). In other words, Rule 9(b) requires a plaintiff to plead "the who, what, when, where and how" of the fraud. *DiLeo v. Emst & Young*, 901 F.2d 624, 627 (7th Cir.1990). The purpose underlying Rule 9(b)'s particularity requirement is to: (1) protect the defendant's reputation; (2) minimize "strike suits and fishing expeditions"; and (3) provide notice of the claim. *Vicom, Inc. v. Harbridge Merchant Services, Inc.*, 20 F.3d 771, 777 (7th Cir.1994). However, although a plaintiff must plead the circumstances of the alleged fraud with particularity, "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally." Fed.R.Civ.P. 9(b).

Here, a careful review of the Complaint reveals that Extra has adequately pled facts setting forth "the identity of the person who made the misrepresentation, the time, place, and content of the misrepresentation, and the method by which the misrepresentation was communicated to the plaintiff." *General Elec. Capital*, 128 F.3d at 1078. For example, as set forth in detail above, Extra alleges that Mr. Cahill induced Extra to come to Illinois by leading Extra to believe that Mr. Sharman had authority to bind Case Brasil.

Based on this representation, on October 19, 1999, Mr. Briante flew to Waukegan, Illinois to meet with Sharman and Cahill. At this meeting, Sharman and Cahill: (1) "manipulated the corporate distinction between itself and Case Brasil" and (2) misrepresented that Mr. Sharman had authority to sign the agreement on behalf of Case Brasil, when he in fact did not. Likewise, the Agreement, drafted by Mr. Cahill, stated that Mr. Sharman had authority to bind Case Brasil.

Accordingly, this Court finds that Extra has pled sufficient facts to meet Rule 9(b)'s heighten pleading standard, and therefore, this Court DENIES the motion to dismiss on the grounds that the fraud claims do not comply with Rule 9(b).

IV. Motion to Strike

Case has also moved to strike paragraphs 33-36, 46-47, and 63-67 in the Complaint. Federal Rule of Civil Procedure 12(f) gives courts discretion to strike allegations in a complaint that are "immaterial, impertinent, or scandalous." Such motions, however, are "not favored" and will only be granted where the allegations have "no relation to the controversy and [are] unduly prejudicial." *Villalovos v. Sundance Assocs., Inc.*, 2003 WL 1152443, at *5 (N.D.Ill. Jan. 13, 2003). Allegations are "immaterial" for purpose of Rule 12(f) only if they have "no essential . . . relationship to the claim[s]." *Chicago Printing Co. v. Heidelberg*, 2001 WL 1646567, at *1 (N.D.Ill. Dec. 21, 2001). When determining whether an allegation is "immaterial" the court must consider whether the facts alleged "possib[ly] . . . from the basis for admissible evidence." *Id. See also Sutton Place Dev. Co. v. Green*, 1987 WL 5951, at *1

(N.D.Ill. Jan. 27, 1987) (allegations are only immaterial if they "have no possible bearing on the issues at trial"). Similarly, a matter is "impertinent if it is neither responsive nor relevant to the issues involved in the action." *Sutton Place Dev. Co.*, 1987 WL 5951, at *1. A "scandalous" allegation is one which "unnecessarily reflects upon the moral character" of the defendant. *Id.*

The burden to meet the above strong showing is on the movant, who must specifically explain why the paragraphs are repetitive, immaterial, or scandalous. *Id.* Even if such a showing is made, however, the motion should be denied if "the allegations might serve to achieve a better understanding of the claim . . . or perform some other useful purpose in the just disposition of the litigation." *Woodson v. Cook Co. Sheriff*, 1996 WL 604051, at *5 (N.D.Ill. Oct. 18, 1996).

With the above standards in mind, the Court now turns to the specific paragraphs which Case seeks to strike. Paragraphs 33-36 and 46-47, detail the alleged improper conduct by Case Brasil officers (including the illegal charge backs to Extra) and Case's internal investigation into this conduct before signing the Agreement. Paragraphs 63-67 pertain to the information which Extra supplied to Case pursuant to the Waukegan Agreement and what Case did with this evidence, *e.g.*, it fired the corrupt Case Brasil employees. These allegations are relevant to Case's intent and motivation to defraud Extra and what benefits Case received under the Agreement. Accordingly, because these paragraphs supply relevant information and do not appear overtly prejudicial, this Court DENIES Case's motion to strike.

CONCLUSION

For the reasons discussed, this Court: (1) DENIES Defendant Case Corporation's Motion to Dismiss [28-1] with respect to the fraud claims (Counts I and III) but GRANTS it as to the negligent misrepresentation claim (Count II); and (2) DENIES Case's request to strike.

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 03-2863
Argued January 9, 2004
Decided March 15, 2004

EXTRA EQUIPAMENTOS E EXPORTAÇÃO LTDA., *et al*,
Plaintiffs-Appellants,

—v.—

CASE CORPORATION,
Defendant-Appellee.

CHRISTOPHER T. SHEEAN, KELLEY, DRYE & WARREN, Chicago, IL, PAUL F. DOYLE (argued), KELLEY, DRYE & WARREN, New York, NY, for Plaintiff-Appellant.

WILLIAM J.F. ROLL, III (argued), SHEARMAN & STERLING, New York, NY, WILLIAM E. DEITRICK, MAYER, BROWN, ROWE & MAW, Chicago, IL, for Defendant-Appellee.

Before POSNER, RIPPLE, and ROVNER, Circuit Judges.

POSNER, Circuit Judge.

Extra, a Brazilian company, sued Case, a major U.S. manufacturer of farm and construction equipment, in the federal district court in Chicago, charging fraud. (The co-plaintiff, Extra's boss, can be ignored.) Jurisdiction was based on 28 U.S.C. § 1332(a)(2), because the suit was between a citizen of a state (Case) and citizens of a foreign country (Extra and its boss). The district judge dismissed the suit under Fed.R.Civ.P. 19(b) on the ground that Case Brasil & Cia, Case's wholly owned Brazilian subsidiary, was an indispensable party to the suit. Extra appeals.

Case Brasil had hired Extra to distribute Case products in Brazil. In 1999, Extra sued Case Brasil in a Brazilian court, claiming that corrupt employees of the subsidiary had caused the subsidiary to overcharge Extra. Later that year, a "settlement agreement" was negotiated and signed in Illinois by representatives of Extra and Case. No official of Case Brasil was present or signed the agreement, although the Case executive who signed it purported to be acting on behalf of both parent and subsidiary. The agreement ended the Brazilian litigation and provided that Case Brasil would continue to use Extra as a distributor and would seek no more than $2 million in past-due payments that it claimed Extra owed it under the distributorship contract. In exchange, Extra, besides dropping its suit against

Case Brasil, promised to give Case information about the corrupt conduct of Case Brasil's employees that would enable Case to have them removed (thus avoiding possible trouble with the Brazilian government) without the parent or subsidiary incurring liability.

Extra filed the present suit in 2001, complaining that Case had defrauded Extra by inducing it to enter into the settlement agreement when Case knew that Case Brasil would not be bound by the agreement and would not perform its obligations under it. Case's objective in committing the fraud, Extra charged, was to get Extra's Brazilian suit against Case's subsidiary dropped and obtain the information about the corruption at the subsidiary without incurring any of the costs of the agreement arising from the fact that the agreement required Case Brasil to continue Extra as a distributor and to limit its claims for past moneys due from Extra to $2 million. But (according to Extra) Case Brasil, claiming not to be bound by the agreement because it had not authorized its parent to make it—indeed, contending that it had had no wind of the negotiations or of the signing of the agreement—terminated Extra's distributorship and refuses to recognize any limit on its money claims, though Case was happy to receive the information about the corrupt employees that Extra furnished it pursuant to Extra's obligations under the agreement. Case had thus "manipulated the corporate distinction between itself and Case Brasil" by falsely representing that the Case official who signed the agreement was authorized to sign on behalf of Case Brasil.

Case moved to dismiss the suit on the ground that since Case Brasil *was* a party to the settlement

agreement—the Case executive who signed it having signed it on the subsidiary's behalf as well as the parent's—the subsidiary was an indispensable party to the suit. After some discovery, the district judge agreed and dismissed the suit. This was a preliminary ruling, on jurisdiction, and not a ruling that Extra has no fraud case against Case. And anyway the essence of Extra's case is not that Case Brasil was not bound by the settlement agreement, but that Case schemed to make sure that Extra would not benefit from the agreement.

Case had moved in the alternative for dismissal under the doctrine of forum non conveniens, arguing that Brazil was a more convenient locale for the litigation of the fraud claim (there is no suggestion that Extra could not sue Case there). *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981). But the district judge did not rule on the alternative ground.

Case denies that it committed fraud. It contends that the executive who signed the settlement agreement was indeed authorized to do so on behalf of both parent and subsidiary and therefore Case Brasil became bound by the settlement agreement, and that it has never repudiated or, for that matter, violated it, though it has terminated Extra's distributorship (but without, Case contends, violating the agreement). Case points out that Extra has sued Case Brasil in Brazil for damages arising from the termination and that the suit is pending.

Two steps are involved in deciding whether someone is indispensable to a suit, so that the suit must be dismissed if, as in this case, he can't be made a party. The diversity jurisdiction does not extend to a suit in which there is a U.S. citizen on only one

side of the suit and foreign parties on both sides, *Karazanos v. Madison Two Associates*, 147 F.3d 624, 627 (7th Cir.1998); *Israel Aircraft Industries Ltd. v. Sanwa Business Credit Corp.*, 16 F.3d 198, 202 (7th Cir.1994); *Allendale Mutual Ins. Co. v. Bull Data Systems, Inc.*, 10 F.3d 425, 428 (7th Cir.1993); *Universal Licensing Corp. v. Paola del Lungo S.p.A.*, 293 F.3d 579, 580-81 (2d Cir.2002), as there would be if Case Brasil became a defendant. And the federal courts' supplemental jurisdiction cannot be used to leap this jurisdictional hurdle. See 28 U.S.C. § 1367(b).

The first step in determining indispensability is to decide whether if the person *could* be joined, he *would have* to be joined. One of the circumstances in which he would have to be joined (if he could be) would be if he "claims an interest relating to the subject of the action and is so situated that the disposition of the action in [his] absence may as a practical matter impair or impede [his] ability to protect that interest." Fed.R.Civ.P. 19(a)(2)(i). The second step is to determine, if he cannot be joined, "whether in equity and good conscience the action should proceed among the parties before [the court], or should be dismissed." Fed.R.Civ.P. 19(b). Rule 19(b) lists several factors as bearing on this determination, of which the two most important in this case are "to what extent a judgment rendered in the person's absence might be prejudicial to" him and "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

Because of the looseness of the terms "equity and good conscience" and because their applicability is to be determined in each case by weighing several factors with no weights indicated, we agree with

those courts (the majority) that hold that appellate review of a determination of indispensability is limited to deciding whether the district judge has committed an abuse of discretion. E.g., *National Union Fire Ins. Co. v. Rite Aid of South Carolina, Inc.*, 210 F.3d 246, 250 n. 7 (4th Cir.2000); *Davis v. United States*, 192 F.3d 951, 957 (10th Cir.1999); *Washington v. Daley*, 173 F.3d 1158, 1165 (9th Cir.1999); *Jota v. Texaco Inc.*, 157 F.3d 153, 161 (2d Cir.1998). The more particularistic, and the less rule-bound and therefore more discretionary, the required judgment made by the trial court, the more limited the competence of the appellate court. A judgment that is not governed by a rule cannot be determined to be correct or incorrect by comparing it to the language or purpose of a rule, because there is none; there is just a medley of imponderables. All the appellate court can do as a practical matter in such a situation is to decide whether the trial court exercised judgment in a reasonable manner.

The second factor that we quoted—whether the plaintiff has an alternative if the suit is dismissed-supports the district court's ruling. Dismissal would not be a disaster for Extra. It can bring its fraud claim against Case in a Brazilian court or, if it prefers, in a state court in Wisconsin, where Case is headquartered, or Illinois, where the settlement agreement was negotiated and signed. Extra is a Brazilian company and therefore should be especially comfortable litigating in Brazil's court system, and Case is suable there—remember that it moved to have the case transferred to Brazil, and we take this to be binding consent to be sued there. Brazil seems in fact a natural venue for the litigation, given the pendency there of the related litigation between

Extra and Case's Brazilian subsidiary. We do not say that Brazil is in fact a more convenient forum for the fraud litigation; that is the issue raised by Case's forum non conveniens motion, which the district judge did not address. Such a motion, like a motion to dismiss for failure to join an indispensable party, is addressed to the district judge's discretion, *Piper Aircraft Co. v. Reyno*, *supra*, 454 U.S. at 257, 102 S.Ct. 252; *In re Ford Motor Co.*, 344 F.3d 648, 651 (7th Cir.2003), and it is not for us to exercise that discretion in the judge's place. Our point is only that dismissal of this suit will not force Extra to abandon its fraud claim; it has an alternative forum, indeed alternative forums, in which to litigate it.

So this is a factor favoring indispensability. But the first factor bearing on the issue—whether a judgment in this suit would so harm Case Brasil that it would be inequitable to allow the suit to proceed to judgment without its being a party—is not as supportive of a finding of indispensability as the judge thought. She termed Case Brasil a "primary or active participant in the acts underlying the alleged fraudulent conduct" and said that its presence in the litigation would be "vital to this Court's determination of whether Case is liable." The alleged fraud, to repeat, was Case's making Extra think that the settlement agreement gave Extra the right to remain a distributor of Case Brasil and capped its liability to Case Brasil. This allegation makes Case Brasil, which has been sued for terminating Extra, an intended beneficiary of the fraud but possibly an unwitting one, so it is unclear whether it would be hurt by a judgment against Case, as it would be if it were determined to be a participant in the fraud. *Freeman v. Northwest Acceptance Corp.*, 754 F.2d

553, 559 (5th Cir.1985). And while evidence obtained from Case Brasil might well be vital to a determination of whether Case committed the alleged fraud—there may have been no fraud if Case Brasil is, as Case claims, bound by the settlement agreement—this would just make Case Brasil an indispensable witness, and an indispensable witness isn't an indispensable party.

The judge added that "a judgment entered by this Court would prejudice Case Brasil because it would impair its ability to defend itself in subsequent actions which Extra could file regarding its actions and obligations under the [Settlement] Agreement." Either in the pending litigation in Brazil or in a new case there or in a U.S. state court, Extra might be able to use findings underlying a judgment in its favor in the suit in the Northern District of Illinois to further its claims against Case Brasil. Suppose Extra proves that the purpose of the agreement was to enable Case to obtain the information that it wanted about the corrupt practices of its subsidiary's employees without preventing Case Brasil from terminating Extra, by making Extra think that by agreeing to turn over the information it would preserve its distributorship, when all along Case Brasil was planning to repudiate the agreement on the ground that it had never become a party to it. Such a finding might help Extra prove in the Brazilian litigation against Case Brasil that the termination of the distributorship agreement was a breach for which Case Brasil must pay damages. Or suppose that while Case tried in the present litigation to show that there was no fraud because its subsidiary performed all the subsidiary's obligations under the settlement agreement, the court found the contrary.

Such a finding too might be used against Case Brasil in Brazil.

Under Illinois law, as under American law in general, findings made after a full and fair hearing and essential to the judgment entered on the basis of that hearing can be used to preclude relitigation of the issues resolved by the findings in another lawsuit between the same parties, or parties in privity with them. *Herzog v. Lexington Township*, 167 Ill.2d 288, 212 Ill.Dec. 581, 657 N.E.2d 926, 929-30 (1995); *Brokaw v. Weaver*, 305 F.3d 660, 669 (7th Cir.2002) (Illinois law); *Kalush v. Deluxe Corp.*, 171 F.3d 489, 493 (7th Cir.1999) (ditto). Although Extra rather surprisingly does not contend that Case Brasil is merely an alter ego of Case—that is, does not try to "pierce the corporate veil" and thus treat the two corporations as one—it does contend that Case Brasil was a tool used by its parent to commit the fraud. It contends that the promise that Case Brasil would not terminate Extra or seek payment of more than $2 million was the bait dangled before Extra to persuade it both to drop its suit against Case Brasil and give Case the information about Case Brasil's corrupt employees that Case needed to clean up its subsidiary—and the tool might well be thought to be in privity with the hand, as in other agency settings. *Moy v. County of Cook*, 159 Ill.2d 519, 203 Ill.Dec. 776, 640 N.E.2d 926, 928 (1994); *Horwitz, Schakner & Associates, Inc. v. Schakner*, 252 Ill.App.3d 879, 192 Ill.Dec. 515, 625 N.E.2d 670, 674 (1993); *Ellens v. Chicago Area Office Federal Credit Union*, 216 Ill.App.3d 101, 159 Ill.Dec. 594, 576 N.E.2d 263, 266 (1991).

That, however, is so under Illinois's law of collateral estoppel, and we are given no indication of

what Brazil's law on the matter is; it may be quite different. See Antonio Gidi, "Class Actions in Brazil-A Model for Civil Law Countries," 51 *Am. J. Comp. L.* 311, 384-86 and n. 233 (2003). Nor whether, though under federal law Illinois's law of collateral estoppel would determine the preclusive effect of a federal judgment rendered in a diversity case governed by Illinois substantive law, see *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508-09, 121 S.Ct. 1021, 149 L.Ed.2d 32 (2001); *Matosantos Commercial Corp. v. Applebee's Int'l, Inc.*, 245 F.3d 1203, 1207-08 (10th Cir.2001); *Marshall v. Inn on Madeline Island*, 631 N.W.2d 113, 120-21 (Minn.App.2001); *In re Armstrong*, 294 B.R. 344, 357-58 (10th Cir. BAP 2003), Brazil has a similar rule. If it does not, or if, as Professor Gidi suggests, Brazil does not have a doctrine of collateral estoppel, Case Brasil may have little to fear from the outcome of the present litigation.

There is another point that the district judge did not address, and that is the significance of the fact that Case Brasil is a wholly owned subsidiary of Case. Even so, because Extra does not argue that Case Brasil is an alter ego of Case, it will be treated by the law for most purposes as an independent entity. But it doesn't follow that its relation to Case is irrelevant to determining indispensability. If Case and Case Brasil were separately owned, Case Brasil could not rely on Case to protect its interests fully in the Northern District litigation if Case Brasil were not (as it cannot be) a party. But given the complete identity of interests by virtue of Case's being the sole owner of Case Brasil, we find it hard to see how Case Brasil can be harmed by not being made a party to the suit in Chicago. Suppose that a judg-

ment against Case in the Northern District would be given preclusive effect, or at least (as may be likelier, Rudolf B. Schlesinger *et al.*, *Comparative Law* 481-84 (6th ed.1998)) considerable weight, in the Brazilian litigation and result in a cost to Case Brasil of $10 million. Since Case owns all of Case Brasil, the judgment would cost Case the same amount, so it would have the identical incentive to defend Case Brasil's interests in Chicago as Case Brasil would have if it could be joined as a party. *North Shore Gas Co. v. Salomon Inc.*, 152 F.3d 642, 648 (7th Cir.1998); *In re Cambridge Biotech Corp.*, 186 F.3d 1356, 1373 (Fed.Cir.1999); *Dainippon Screen Mfg. Co., Ltd. v. CFMT, Inc.*, 142 F.3d 1266, 1272 (Fed.Cir.1998); *Pujol v. Shearson/American Express, Inc.*, 877 F.2d 132, 135 (1st Cir.1989); but see *Freeman v. Northwest Acceptance Corp.*, *supra*, 754 F.2d at 555, 559. Indeed, we have great difficulty seeing how a 100 percent subsidiary could *ever* be an indispensable party; the cases that we have cited, while refusing to treat 100 percent ownership as an absolute bar to a finding of indispensability, do not indicate any factors that would justify finding a 100 percent subsidiary to be indispensable. But maybe there is a wrinkle in the corporate structure of Case and Case Brasil that is eluding us which would require a different conclusion.

The weight a Brazilian court would give a U.S. judgment in Extra's favor and the significance of Case's sole ownership of Case Brasil are conspicuous loose ends in the district judge's analysis of indispensability. We repeat that her ruling is reviewable only for an abuse of discretion. But before the issue of abuse is even reached, the appellate court must be satisfied that the judge has exercised her

discretion responsibly by considering all the salient factors that would enter into a responsible exercise. That was not done here and the judgment must therefore be vacated and the case remanded for further consideration of the issue, consistent with the guidance provided by this opinion.

VACATED AND REMANDED.

UNITED STATES DISTRICT COURT
N.D. ILLINOIS, EASTERN DIVISION

No. 01 C 8591
August 15, 2002

EXTRA EQUIPAMENTOS E EXPORTACAO LTDA.
and PERSIO D. BRIANTE,

Plaintiffs,

—v.—

CASE CORPORATION,

Defendant.

MEMORANDUM AND ORDER

MANNING, J.

Plaintiffs Extra Equipamentos E Exportacao Ltda. ("Extra") and Persio D. Briante ("Briante") filed the instant diversity action against Defendant Case Corporation ("Case") alleging breach of contract and fraud in connection with a settlement agreement entered into between Extra and Case and/or Case Brasil & Cia ("Case Brasil"), Case's subsidiary in Brazil. The current matter is before the Court on

Case's motion to dismiss Extra's complaint, pursuant to Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), 12(b)(7), and 19, as well as on the grounds of *forum non conveniens*. For the reasons that follow, the motion is GRANTED.

BACKGROUND[1]

Extra is a private corporation organized under Brazilian law with its principal place of business in Brazil. Briante is a citizen of Brazil. Case is a corporation organized under Delaware law with its headquarters in Wisconsin. Case Brasil, an indirectly owned subsidiary of Case, is a general partnership organized under Brazilian law with its principal offices in Brazil.

Since 1992, Extra has sold Case construction and farm equipment pursuant to a distribution agreement between Extra and Case Brasil. In 1999, Extra brought suit against Case Brasil in Brazil in connection with an alleged scheme whereby Case Brasil was approving loans for farm equipment on behalf of Extra, and then, when the customers defaulted, debiting the defaulted loans against Extra's account. In the lawsuit, Extra sought: (a) payment of all commissions owed to Extra; (b) amendment of the credit clause and reversal of the illegitimate debits transferred to Extra's current account; and (c) payment for repairs and parts provided by Extra to Case's "commission" customers.

In October of 1999, Extra entered into an agreement entitled "Release of Claims and Settlement of Certain Obligations" ("the Agreement"). Extra con-

[1] The facts in the background section are drawn from Plaintiff's complaint.

tends that the Agreement was negotiated between, and signed by, executives of Case and Extra. In contrast, Case contends that the Agreement was negotiated between Extra and Case Brasil, and signed by an executive who represents Case and Case Brasil.

The Agreement states that it was "entered into by and between Case Brasil & Cia and Equipamentos Exportacao Ltda." (Pl.'s Compl., Ex. A, p. 1.) The signatories were Persio Domingos Briante, who signed on behalf of Extra, and James A. Sharman, who signed on behalf of Case Brasil. Within the Agreement, the term "Case" was defined to include "Case Brasil & Cia, Case Corporation, and their past, present, and future: subsidiaries, divisions, parent corporation, predecessors. . . ." (*Id.*)

Under the terms of the Agreement, Extra was assured continuation of its distributorship on terms at least as favorable as other Case distributors in Brazil and Extra's liabilities to Case Brasil were capped at $2,000,000. In exchange, Extra contends that it provided Case with information regarding Case Brasil's improper conduct in Brazil. Case, while not directly contradicting Extra's view of the events leading up to the execution of the Agreement, asserts that the discharge and release from all claims against Case Brasil was the main consideration for which it bargained, not information regarding Case Brasil's operations.

Extra contends that Case has breached the Agreement by its failure to: (1) present Extra, "or [cause] Case-Brazil to present," a controlling Portuguese version of the Agreement; (2) treat Extra fairly and in good faith as a Case distributor; (3) proffer, "or cause Case-Brazil to proffer," a "Commercial Representation Agreement" and "Technical Services

Agreement" by October 31, 1999; (4) retain Extra as a distributor on the terms/conditions of the original 1992 distribution agreement and, thereafter, on terms no less favorable than Case Brasil's other distributors; and (5) "refus[e] to cap all liabilities owed to Case Brazil at U.S. $2,000,000."

In response, Case filed the instant motion to dismiss on grounds of *forum non conveniens* and failure to join an indispensable party (Case Brasil).[2] Case has also filed two declarations with its motion: one by José Orlando de Almeida de Arrochela Lobo, a Brazilian lawyer, who provides information on Brazil as an adequate alternate forum, and the second by Maria Luiza De Franco Agudo, an officer of Case Brasil, who contends that the Agreement was entered into by Extra and Case Brasil.

STANDARD OF REVIEW

In ruling on a motion to dismiss for failure to join an indispensable party, the court must accept the allegations of the complaint as true. *Davis Companies v. Emerald Casino, Inc.*, 268 F.3d 477, 479 (7th Cir.2001); *Pasco Int'l (London) Ltd. v. Stenograph Corp.*, 637 F.2d 496, 499 (7th Cir.1980). The court may, however, look outside of the pleadings and consider extrinsic evidence. *Davis*, 268 F.3d 477, 480 (7th Cir.2001); *English v. Cowell*, 10 F.3d 434, 437 (7th Cir.1993); *Capitol Leasing Co. v. Fed. Dep. Ins. Corp.*, 999 F.2d 188, 191 (7th Cir.1993).

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[2] Although this Court set a briefing schedule, Plaintiffs did not file a response to the motion to dismiss, and therefore, the Court will decide the motion without benefit of Plaintiffs' response.

DISCUSSION

Case has moved this Court to dismiss Extra's complaint, pursuant to Rule 19, for failure to join an indispensable party and on the grounds of *forum non conveniens*.[3]

A motion to dismiss under Rule 19 requires a two-step analysis. First, a court must determine whether or not a party is necessary or, in Rule 19 nomenclature, a "person to be joined if feasible." Fed.R.Civ.P. 19(a); *U.S. ex rel Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 478 (7th Cir.1996). Second, if a party is found to be necessary under Rule 19(a) but cannot be joined, the court must then decide if the action can proceed in "equity and good conscience" without the necessary party, or whether it should be dismissed. Fed.R.Civ.P. 19(b). The Court will discuss each requirement in turn.

I. Necessary Party

To determine if a party is necessary under Rule 19(a), courts consider whether: (1) complete relief can be accorded among the present parties to the lawsuit; (2) the absent party's ability to protect its interest will be impaired; and (3) any existing parties might be subjected to a substantial risk of multiple or inconsistent obligations unless the absent party is joined. *Thomas v. United States*, 189 F.3d 662, 667 (7th Cir.1999).

In applying these factors, the Seventh Circuit has held that a party to a contract is a necessary party

[3] Because the Court finds that Extra has failed to join an indispensable party, it will not discuss the *forum non conveniens* issue.

because, "as a practical matter," the parties to a contract have a commercial interest in a judicial declaration concerning that contract. *Hall*, 100 F.3d at 479. *See also CIGNA Healthcare of St. Louis, Inc. v. Kaiser*, 181 F.Supp.2d 914, 920 (N.D.Ill.2002); *Burger King Corp. v. American National Bank & Trust Co. of Chicago*, 119 F.R.D. 672, 674 (N.D.Ill.1988).

In *Travelers Indemnity Company v. Household International, Incorporated*, 775 F.Supp. 518, 525 (D.Conn.1991), the court was faced with a situation similar to the instant case-it was unclear whether a subsidiary or its parent was the party to a contract. The plaintiff/insurer brought a breach of contract action against the defendant/insured to recover money paid out on an insurance policy. On a motion to dismiss for failure to join an indispensable party, the defendant contended that the underlying insurance policy was actually issued by the plaintiff's subsidiary who, if joined in the action, would destroy diversity jurisdiction. *Id.* Noting that language of the policy was "confusing," the court nevertheless, held that the subsidiary was the contracting party based solely on the language of the contract. *Id.* The agreement contained a subheading that named the subsidiary and the page setting forth the policy's provisions and exclusions listed the name of the subsidiary. The signature page stated, "[the subsidiary] has caused this policy to be signed." Therefore, that court concluded, the subsidiary was the actual party in interest and therefore a necessary party.

Here, the Agreement states that Case Brasil is a party to the contract. The Agreement defines "Case" to include Case Brasil; the signing parties are identified in the contract as "EXTRA EQUIPAMENTOS

EXPORTACAO LTD." and "CASE BRASIL & CIA"; and the Agreement contains the subheading "[t]his Release . . . is entered into by and between Case Brasil & Cia and Extra Equipamentos Exportacao Ltda." (Pl.'s Compl., Ex. A.) Additionally, Case filed the declaration of Maria Luiza De Franco Agudo which states that "Case Brasil and Extra settled their financial dispute by entering into the Release of Claims and Settlement of Certain Obligations."[4] (Decl. Maria Luiza De Franco Agudo, ¶¶ 11.) Accordingly, based on the language of the Agreement, this Court holds that Case Brasil was a party to the Agreement, and thus, a necessary party to this action.

Even if the Court found that Case Brasil was not a party to the Agreement, which it does not, Case Brasil may still be a necessary party under Rule 19. Subsidiaries are necessary parties in actions against their parents when the subsidiary is an "active or primary participant" in the acts underlying the action because a judgment rendered in the subsidiary's absence may "have a preclusive effect on [its] ability to relitigate certain issues . . . even if not formally preclusive, an adverse ruling would have an adverse precedential effect on the subsidiary's position in future litigation." *Polanco v. H.B. Fuller Co.*, 941 F.Supp. 1512, 1521 (D.Minn.1996).*Seealso Dernick v. Bralorne Resources, Ltd.*, 639 F.2d 196, 199 (5th Cir.1981) (failure to join a subsidiary that was the primary participant "would be improper" under Rule 19); *Jurimex Kommerz Transit G.m.b.H. v.*

[4] In a motion to dismiss for failure to join an indispensable party, a court may look outside of the pleadings and consider extrinsic evidence. *Davis*, 268 F.3d at 480; *English*, 10 F.3d at 437; *Capitol*, 999 F.2d at 191.

Case Corp., 201 F.R.D. 337, 340 (D.Del. July 23, 2001) (subsidiary is a necessary and indispensable party under Rule 19 when a plaintiff seeks to hold parent company liable for conduct of subsidiary).

Here, the Agreement contains many provisions, including most of those on which Extra bases its breach of contact claims, which require actions to be undertaken by Case Brasil. For example, under the terms of the Agreement, Case Brasil was to treat Extra like all of its other distributors and cap the liabilities Extra owed to Case Brasil at $2,000,000. Additionally, in its Complaint Extra uses language such as "Case U.S.A., through Sharman and others, promised to cause Case-Brazil . . ." and "Case U.S.A. never presented, or caused Case-Brazil to present . . ." that supports a conclusion that Case Brasil was a "primary participant," and is, therefore, a necessary party. Thus, even if Case Brasil was not a party to the Agreement, the Court finds that it is a "primary participant," and thus, a necessary party under Rule 19(a).

II. Indispensable Party

Because the Court finds that Case Brasil is a necessary party, Case Brasil must be joined in this litigation. Unfortunately for Plaintiffs, however, Case Brasil cannot be joined in the instant case because both Case Brasil and Extra would be foreign parties, and therefore, this Court would no longer have diversity jurisdiction under 28 U.S.C. 1332. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 829, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989) ("[w]hen a plaintiff sues more than one defendant in a diversity action, the plaintiff must meet the requirements of the diversity statute for each defendant or face

dismissal"); *Karazanos v. Madison Two Associates*, 147 F.3d 624, 627 (7th Cir.1998) (where one side of the action contains only foreign parties and the other side has a mixture of foreign and domestic parties, the case falls outside section 1332's jurisdictional grant).

If a party is found to be necessary under Rule 19(a) but cannot be joined, the court must then decide if the action can proceed in "equity and good conscience" without the necessary party, or whether the case should be dismissed. Fed.R.Civ.P. 19(b). In other words, the second step in the bifurcated Rule 19 analysis is to determine if the absent party is "indispensable." *Hall*, 100 F.3d at 479. A party is indispensable when justice cannot be served unless the party is joined. *Chamberlain Mfg. Corp. v. Maremont Corp.*, No. 92-C-0356, 1995 WL 723758, at *7 (N.D.Ill.Dec. 6, 1995) (*citing Provident Tradesman Bank & Trust Co. v. Patterson*, 390 U.S. 102, 109-111, 88 S.Ct. 733, 19 L.Ed.2d 936 (1968).

Courts have found a party to a contract to be "the paradigmatic example of an indispensable party." *Davis*, 268 F.3d at 484; *Rivera Rojas v. Loewen Group Intern., Inc.*, 178 F.R.D. 356, 362 (D.P.R.1998); *Polanco*, 941 F.Supp. at 1520 ("a contracting party is the paradigm of an indispensable party"); *Lopez v. Shearson American Exp., Inc.*, 684 F.Supp. 1144, 1147 (D.P.R.1988) (where the subsidiary is the primary participant in a dispute, the subsidiary is an indispensable party). Therefore, because, as discussed earlier, this Court finds that Case Brasil was a party to the Agreement, the Court finds that Case Brasil is also an "indispensable party" under Rule 19(b).

Additionally, Rule 19(b) provides four factors to be considered in determining whether a party is "indispensable." These factors are: "(1) the extent to which a judgment entered in the absence of a party will be prejudicial to those currently before the court; (2) the extent to which such prejudice can be lessened or avoided by reshaping the judgment; (3) whether a judgment entered in a party's absence will be adequate; (4) whether the plaintiff will have an adequate remedy if the action is dismissed." *Moore v. Ashland Oil, Inc.*, 901 F.2d 1445, 1447 (7th Cir.1990).

In applying these four factors to a parent-subsidiary relationship, courts have held subsidiaries to be indispensable parties where the subsidiary is a necessary party. For example, in *Capital Markets International, Ltd. v. Gelderman, Inc.*, Case No. 97 C 7717, 1998 WL 473468, at *4 (N.D.Ill. Aug. 7, 1998), the court held a subsidiary to be an indispensable party because: (1) the action implicated the subsidiary's contractual relationship with the plaintiff; (2) if the subsidiary was the actual liable party, the plaintiff would not be entitled to relief because the subsidiary was not a party; and (3) an alternative forum was available. *See also Freeman v. Northwest Acceptance Corp.*, 754 F.2d 553, 559 (5th Cir.1985) (holding that a subsidiary is an indispensable party where the plaintiff seeks to impose liability on a parent for the acts of the subsidiary); *Dou Yee*, 149 F.R.D. at 189 (applying the four factors and finding a subsidiary indispensable where it was responsible for paying the commissions at issue, it would likely be responsible for any judgment rendered against the parent company, and an adequate alternative forum existed).

Here, the four factors weigh in favor of finding Case Brasil is an indispensable party. With respect to the first factor, a judgment against Extra would prejudice Case Brasil because its conduct resulted in the alleged breach of the Agreement. The Complaint alleges that the breach of the Agreement stemmed in part from Case Brasil's failure to retain Extra as one of its distributors on terms at least as favorable as other Case Brasil distributors and to cap all liabilities owed to Case Brasil by Extra at $2,000,000. (Pl.'s Compl. ¶ 27). Therefore, any judgment rendered in Case Brasil's absence on this matter could prejudice Case Brasil by impairing its ability to defend itself in subsequent lawsuits.

As for the second factor, the Court sees no way, nor do either of the parties suggest one, that a judgment could be shaped to avoid or limit potential prejudice against Case Brasil. Considering that many of the breaches of the Agreement were to be performed by Case Brasil, a judgment rendered in Extra's favor may involve Case Brasil. Similarly, if Case Brasil is the actual liable party, the Court will not be able to grant Extra the relief it seeks because Case Brasil is not a party to the action. Therefore, without the joinder of Case Brasil, there is no apparent way to avoid or limit potential prejudice against Case Brasil or grant complete relief to Extra.

As for the third factor, a judgment would be inadequate without joining Case Brasil because Extra may still sue in Brazil. The Agreement contains a choice of law clause that states: "This Release shall be construed, interpreted and governed by the laws of Brazil." (Pl.'s Compl. Ex. A, ¶ 18.) Extra asserts, however, that this clause is inoperative because Brazilian law mandates that a contract must comply

with the laws of the place where the agreement is executed, in this case Illinois. (Pl.'s Compl. ¶33.) Nonetheless, as the Court's research and the declaration of José Orlando de Almeida de Arrochela Lobo point out, Brazilian courts have jurisdiction over this action. According to Mr. Orlando de Almeida de Arrochela Lobo, "Article 88 of the Brazilian Civil Procedure Code provides that Brazilian judicial authority is competent whenever (i) the defendant is domiciled in Brazil; (ii) the obligation must be complied with in Brazil; or (iii) the action arises from either a fact occurred in Brazil or from an act practiced in Brazil."[5] (Decl. José Orlando de Almeida de Arrochela Lobo, ¶21.); *See also* "ABA Jurisdiction Project: A Brazilian Perspective" 55 Bus. Law 1801 (2000). Case Brasil is domiciled in Brazil and the obligations that were to be complied with were to take place in Brazil. Thus, Brazil does have jurisdiction over this matter, and if this Court were to proceed without Case Brazil, Case Brasil might be subjected to litigation in two different forums with two potentially different results. With respect to the two current parties, a judgment rendered in Case Brasil's absence would be inadequate because much of what Extra is suing for was to be performed by Case Brasil.

Finally, for the reasons outlined in the preceding paragraph, Extra will not be left without an adequate remedy if this action is dismissed because

[5] José Orlando de Almeida de Arrochela Lobo's declaration was provided by Defendant. And, as stated earlier, in a motion to dismiss for failure to join an indispensable party, a court may look outside of the pleadings and consider extrinsic evidence. *Davis*, 268 F.3d at 480; *English*, 10 F.3d at 437; *Capitol*, 999 F.2d at 191.

Extra may still bring suit in Brazil, which is an adequate forum.

Accordingly, even if the Court accepts Plaintiff's allegation that the Agreement was negotiated and signed between Extra and Case, the four factors outlined in Rule 19(b) favor dismissal for failure to join an indispensable party, and therefore, the Court finds that it cannot proceed in "equity and good conscience" in Case Brasil's absence.

CONCLUSION

For the reasons discussed, the Court concludes that Plaintiffs have failed to join an indispensable party and, therefore, GRANTS Defendant Case's Motion to Dismiss [9-1].

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